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DANE LAW SCHOOL FESTIVAL.

On the recent enlargement of Dane Hall, in Cambridge, the students connected with the Law School determined to celebrate an event so indicative of the prosperity of that institution, in a suitable manner. To this end, they invited the *alumni*, and the members of the bar generally, to a festive entertainment in Dane Hall, previous to which, Mr. Choate consented to deliver an address in the college chapel. The occasion was one of great pleasure to those who were fortunate enough to be present; a pleasure much enhanced by the flourishing condition of the school, with which more than two hundred gentlemen have been connected during the past year.

The subject of Mr. Choate's discourse, was "The Profession of the Law, as an Element of Conservation in the State." He adverted, first, to the twofold nature of the profession, as it had displayed itself under different political systems, to wit, its sympathies with the people and with liberty on the one hand, and its tendencies to conservatism on the other, and omitting, as we understood him, what he had designed to say upon the former, passed to the consideration of the latter. Assuming that conservatism, — the conservatism of our general political system, our union, our constitution, our government, the great body and general system of our jurisprudence, the state, collectively and properly, so called,— was a grand duty, and that the proper field of reform and of progress,

was the individual character, mental and moral; he urged that to the legal profession, as such, was assigned in a peculiar sense, the function of conservatism, for the reason, among others, that its studies and employments tended to form and fit it, to diffuse and impress on the popular mind, a class of opinions concerning the nature, objects, and duration of the state, concerning liberty, concerning our organized or constitutional forms, concerning justice and law, which were indispensable to conservation. Its studies and employments, he urged, trained and armed it to counteract that system of opinions and sentiments, by which our liberty must die, and to diffuse and impress that other system, by which it may be kept alive. This was the leading thought of the discourse, and it was illustrated, by adverting to certain pernicious opinions, supposed to have more or less power on the general mind, respecting the dignity, ends, and duration of the state and of the union; respecting the system of checks and balances embodied in our constitution; respecting the nature of law, and its title to reverence and obedience; and then showing that the studies and employments of the bar tended, on all these subjects, to teach a sounder creed, and to impress loftier and more conservative sentiments, to teach that the state is designed to last, till the heavens are no more; that constitutional restraints are indispensable to the existence of a tolerable liberty; that law is not the offspring of passion or will, but the absolute reason of the state, enlightened by the perfect justice of the state, the wisdom of all the past and all the present, a voice of the people, echoing but the voice of God. The influence of a correct administration of justice, in elevating and correcting the popular idea of law, was particularly considered.

At the close of the address, the company repaired to the Law Library, where a beautiful and sumptuous entertainment was prepared for them. We noticed among the distinguished guests at the table, besides the orator of the day, Judge Story, Judges Davis and Putnam, Judge Pitman of Rhode Island, the Hon. John M. Williams, late chief justice of the court of common pleas, Judge Washburn, Jeremiah Mason, Professor Greenleaf, President Quincy, Charles S. Daveis of Portland, and others, whose names we do not now recall. The intellectual part of the banquet was opened by Judge Story, who presided. He briefly sketched the origin, rise and progress of the law school, and stated many interesting facts in relation to Nathan Dane, its distinguished founder, whose enlightened forecast and noble beneficence conferred such blessings upon us, and the fruits of whose labors we were now so amply enjoying. In 1829, he founded the

Dane Professorship of Law, and bestowed upon it an endowment of ten thousand dollars, to which he subsequently added a donation of five thousand dollars more. In honor of him, the beautiful structure erected for the law department, has been called Dane Law College. We regret that we cannot give at length the very instructive remarks of Judge Story, which he concluded with the following sentiment.

"The memory of Nathan Dane — the author of the Ordinance of 1787 — the author of the great Abridgment of American Law — the founder of the Law School — glory enough for one man, in one age."

The applause with which this sentiment was received testified to the high respect which was entertained for the memory of Mr. Dane.

Judge Story then remarked, that Cicero, speaking of two of the greatest lawyers of his day, said, *Eloquentium jurisperitissimus Crassus — jurisperitorum eloquentissimus Scaevola.* He then added, that after the oration of this day, he thought, that all would concur with him, that there was a union of both in the orator of the day; but what he intended to express had been more appropriately and expressively stated in a toast sent to the chair from the Law School.

"The Orator of the Day. A statesman while he is a Lawyer, and because he is a Lawyer. He is, *himself*, the great sublime he draws."

Mr. Choate briefly responded to this sentiment, and offered the following:

"Nathan Dane; the statesman, lawyer, and benefactor of his country; his ordinance laid the foundation of a free state."

The president next alluded to the distinguished services of President Quincy, and paid a tribute to one who can never be forgotten. He concluded with the following sentiment, which was received with enthusiastic applause:

"The President of Harvard University; long may he live to wear the honors won by eminent public services; *Palmam non sine pulvere.*"

The remarks of President Quincy were expressive of the deepest feeling. He alluded to the fact of his being about to leave the post he had so long and so eminently occupied, and the universal response which followed his remarks, and the sentiment offered by him, showed him how deep was the respect entertained for him. His sentiment was as follows:

"The Dane Law School. May it, in all times to come, be, as it has been in all times past, the resort of those who are among the highest hopes, and the noblest spirits, of every state and section of our country."

The following sentiment was next offered from a member of the Law School:

"The law — a vigorous branch of the tree of knowledge — its life is sure whilst it bears *one Green-leaf*."

Professor Greenleaf replied in a happy manner, and gave as a sentiment:

"The institutions of our country, safe in the hands of the rising generation of lawyers."

But the professor was not allowed to rest here, for his associate, Judge Story, immediately turned upon him the following:

"Professor Greenleaf; we have the best evidence of his law, in his law of evidence."

The president then proposed the following sentiment, in compliment to the Hon. Jeremiah Mason:

"The members of the Massachusetts Bar, past and present — not behind the first in the Union — and its oldest member, *facile princeps, inter pares*."

Mr. Mason responded briefly, and concluded with a sentiment.

The following sentiment, in honor of Judge Davis, received great applause, and was responded to by him in some brief, but pertinent remarks:

"Our venerable friend of the class of 1781 — who resigned office to the regret of all, and now enjoys the *otium cum dignitate*, with the congratulations of all."

Judge Story here cited the following passage from Algernon Sidney, which, he said, had been warmly approved by another great man, Sir William Jones. "It is (the law) void of desire and fear, of lust and anger; it is pure dispassionate mind, written reason — retaining some measure of the divine perfections. It enjoins not that which pleases a weak, frail man, but, without regard to persons, commands what is good, and punishes what is evil, in all, whether noble or base, rich or poor, high or low. It is deaf, inexorable, inflexible." The following sentiment was then given by the president, and received with the greatest applause.

"Rhode Island — small in territory, but large in spirit. The land of good principles, and sound law."

The Hon. Judge Pitman, of Rhode Island, responded, and gave, in concluding his remarks,

"The science of law, and the science of government — these form the 'men — high-minded men,' who constitute a state!"

Judge Story, after alluding to the county of Essex, as the birth-place, or residence, of some of the distinguished lawyers of the state, and pointing to Parsons, Sewall, Dane, Prescott, and Salston-stall, among the dead, and to Putnam and Jackson, among the living, and to the circumstance of his having been a student at law in the office of Judge Putnam, gave the following toast:

"Health and long life to judges Putnam and Jackson, not excelled by any of their contemporaries, in their knowledge and administration of commercial law."

Judge Putnam responded, and expressed his gratification at the kind allusions made by the president, to the relation which had existed between them, when he, the president, was a student of law. He said that he could not say much of the instruction given, but he could say a great deal of that acquired. In ancient times, Iulus used to follow, "*haud passibus equis;*" but the modern Iulus had rushed forward with immense strides, into unexplored regions of jurisprudence, and left Anchises plodding on in the old field, out of sight and out of mind. He remarked that he had attended the celebration with great satisfaction — that the institution had always engaged his attention and interest, and that he regarded it as the morning light, which would increase and diffuse the blessings of law and justice to civilized man. He congratulated the students, on the advantages they possessed. He stated, that the legal presumption was, that they were well grounded in the principles of their profession, and he assumed such presumption as the fact. He then offered some remarks upon the dignity and responsibility of their calling, and upon the independence which they should maintain in its execution; recommending them to maintain a proper respect, and a sincere regard to the rights and feelings of others. In illustration and example, he cited two cases, one of judicial, and the other of professional independence. The first happened in the reign of Henry IV. of England. His son, in his youth, was greatly addicted to riot and dissipation, and some of his dissolute comrades were arraigned before Sir William Gascoigne, then chief justice of England. The prince determined to save them from conviction, by brow-beating the chief justice, and was guilty of an outrageous contempt, in open court. The chief

justice, mindful of his duty, and unawed by the rank of the monarch, committed the heir apparent to prison. The prince submitted to his merited punishment; and when his father was afterwards informed of the circumstances, he had the magnanimity to declare, that he thanked God for giving him a chief justice, who knew how to administer, and a son who rendered obedience to the laws. The other case which he cited, relating to the independence becoming professional advocates, was one, the circumstances of which we have ever considered as one of the brightest spots in our revolutionary history; a triumph of principle of as vital importance, as any victory won by our arms on the battle-field. He remarked that they had all heard of the Boston Massacre, a misnomer, indeed, but pleas in abatement were not allowed by the sovereign people. Captain Preston, and other British soldiers, while on duty in State Street, Boston, were not only insulted by the mob by the most opprobrious language, but were also assaulted and pelted with snow-balls, and their lives put in imminent jeopardy. Under that insupportable provocation, Captain Preston ordered his soldiers to fire. They obeyed, and some of the assailants were killed. Preston, and some of his soldiers, were indicted for murder.

This happened, he remarked, just before the revolutionary war, when the minds of the people were inflamed almost to madness, under their oppressions. It was called a massacre, and the blood of the prisoners was loudly demanded to atone for the alleged murder. The prisoners, in their extremity, applied to John Adams and Josiah Quincy, to defend them. Those gentlemen were known to be at the head of their profession as advocates, and among the most earnest supporters of the claims of America. They saw at once the whole ground. They knew that by the common law their clients were entitled to a fair trial, and they knew that if they undertook the act for the accused, they would be subjected to the obloquy, if not to the rage of the people, and to the charge of having been faithless to the cause of their country. But they were mindful of their duty as advocates, and of the rights of the prisoners. Taking no counsel of flesh and blood, they undertook the defence, and the prisoners were acquitted of the alleged murder, by a jury of the country. Thus, he remarked, the law triumphed; the independence of the advocates was crowned with honor, and the justice of the country was established. Judge Putnam concluded his instructive remarks with the wish, that the students might all have that legal discernment and independence, which should enable them to do justice to all concerned, with a clear conscience towards God and man.

The following sentiment was then sent up to the President:

"George S. Hillard — one of the best *fellows*, and one of the best *spokes-men* in our *common weal*."

In obedience to the unanimous call, Mr. Hillard rose, and followed in a strain of eloquence which made a deep impression upon all who heard him. He remarked that he was one of the oldest members of the law school then present. That it was then in its commencement, but had since expanded as the mustard-seed becomes the tree. The place and the occasion reminded him of the past. He alluded to many members of the school who had since died, and briefly characterized them. He then proceeded to remark upon the profession of the law, and to make some observations upon the theme suggested by Mr. Choate's address. The highest ends and aims of the profession were moral. Success was an accident. It might or might not come. It often followed the unworthy, and neglected the deserving. But character and worth were independent of chance. They secured a permanent possession of respect. Whoever practised the law in a noble and high spirit was an ornament to humanity. He illustrated this by instances from history. How inferior was the fame of such men as Thurlow, Wedderburne, or Abinger, to the pure glory which hallowed the name of Romilly, whose course in parliament, when the matter of the Duke of York and Mrs. Clarke was under examination, was contrasted with the sickening devotion of Lord Eldon to the same worthless member of the royal family. He also passed an animated eulogium upon the self-devotion of John Jay, who left the proud post of chief justice of the supreme court of the United States, to negotiate the British treaty, with a full conviction that he should make himself a victim by so doing. Men like Romilly and Jay, were the proper models for young lawyers to shape themselves by. He concluded with the following sentiment:

"*The grave of the upright lawyer.*"— "*Cujus est solum, ejus est usque ad cœlum.*"

The next sentiment was as follows:

"The Maine bar — the *Main stay* of the State."

This was responded to by Charles S. Daveis, Esq., of Portland, who concluded his remarks with the following:

"James Bowdoin — type of the union of liberty and law — liberty secured by law, and law rendered triumphant over the excesses of liberty."

Judge Story then offered the following sentiment, in compliment to Judge Williams:

"The late chief justice of the common pleas, to whom, in the exercise of his official functions, it was not only common but invariable, to instruct as well as to please."

Judge Williams briefly responded, and gave:

"The pupils of Dane Law School — may they ever bear in mind the solemn consideration, that of those to whom much is given, of them will much be required."

The president then alluded, at some length, to the public services of Chancellor Kent, who, he remarked, gave to the world his able treatise upon American law, after his state thought him too old to serve them; and concluded with the following sentiment, which was received with the greatest applause:

"Chancellor Kent. Uniting in himself the achievements of Hardwicke, Mansfield, and Blackstone. Each of us may say, *Haud invidio — miror magis.*"

The following letter was then read from John Quincy Adams.

QUINCY, 1st July, 1845.

Gentlemen, — Your obliging invitation of the 10th ultimo, to the social and intellectual banquet proposed to be held on the 3d of this month, for mutual gratulation upon the successful progress of the institution, of which you are reaping the ripe fruits for the benefit of our country, has been received, with grateful sentiments for your kindness, and with an earnest desire to avail myself of it. A July winter has interposed an obstacle which I am not at liberty to disregard, and which leaves me only the alternative, of longing to share with you the rich repast, which genius and fancy are providing for you, on that day, in the name of law. Instead of my presence, I offer you a sentiment suited to the occasion and the day.

"Liberty and Law — associated, till the judgment day, with the name of Nathan Dane."

I am with great respect, gentlemen,
Your friend and fellow student,
JOHN QUINCY ADAMS.

The following sentiment was then offered by the president.

"John Quincy Adams. A scholar, a statesman, and a jurist — whose labors are embedded, like beautiful mosaic, in the history of his country."

A letter received from William Anthon, Esq. of New York, was then read. It was as follows:

Gentlemen, — My professional duties will deprive me of the pleasure of being present at the celebration of the opening of your law library. My best wishes,

however, will be with you. The treasures you are accumulating will benefit distant generations, perhaps, more than the present, which seems too much inclined to undervalue the labors of former days. I esteem the common law the great conservative principle, on which the nation will fall back, after it has passed through the phases of codification and similar follies. Then your collection will, I trust, be found one of the "old fields out of which cometh the new corn," and your labors of the day be duly valued.

I am with great respect,
Your obedient servant,
WILLIAM ANTHON.

The following from Dr. Oliver Wendell Holmes, of Boston, was next read.

Gentlemen, — I am deeply sensible of the honor you have conferred upon me, in choosing to remember that I was once an unworthy student of the noble science to which you have devoted yourselves. It is only by an act of great self-denial, that I can keep myself away from the celebration to which I have been so kindly invited. But I feel that my presence would be, in medical language, an "*error loci*," — in legal terms, *a trespass*, which would render me liable to all the penalties of an intruder. I never fairly took root in legal ground — like the child in the epitaph, I was transplanted in the bud to blossom elsewhere.

Let me speak with all honor and gratitude of the new calling for which I left your ranks so many years ago. It has conferred upon me great and ever multiplying pleasures. It has opened new sources of intellectual culture. It has multiplied a hundredfold, the endearing relations of life. It has written lessons upon my heart, better than all that books contain or sages utter. But I feel, that in leaving the courts of your august science, I was leaving the most profound, the most brilliant, the most aspiring of my companions and fellow students; that I was quitting the central channel, in which the stream of youthful talent was flowing most largely and freely; that I was bidding farewell to the lips of eloquence; that I was making myself an alien to the paths of literature; that I was loosening the ties of friendship which would have been the happiness, as well as the honor of my life. The change from your pursuit to mine, is like turning a ring upon the finger — the sterling gold perhaps shows better, but the brilliant is eclipsed forever.

I can only console myself, by remembering, that our professions have so much in common. If your *Themis* settles difficulties, our *Anthemis* settles stomachs. We have the *mel rosæ* in our Pharmacopœia, but what apothecary can mingle honey and roses like a counsellor before a jury? Which is most familiar with the *habeas corpus* act, the attorney, or the anatomist? Look at the statue of Justice — blind and barefoot. Did not surgery show her how to put on a bandage? What legal quibbles can equal the tricks of charlatanry, those "medicinal gums" of which Othello speaks so feelingly?

And, lastly, it is impossible to overlook the instinctive feeling with which the two professions regard each other. Who has not observed, that lawyers commonly have a liking for medicine? Ask for Iceland moss, at the druggists, and you will see what an extraordinary *lichen* medicine has for them.

Let me conclude, therefore, by a sentiment expressed in the form which habit has rendered familiar and agreeable to my mind, embodying a desire that the

sister sciences may be harmoniously blended, in company with good fellowship and good principles.

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Juris incorrupti,
Medicinæ rationalis, partes æquales,
Amicitiæ ferventis amphoram plenam
Vini optimi guttas perpaucas;
Tere simul et infunde,
Religionis purissimæ quantum sufficit;
Fiat Mistura, omni horâ sumenda!

Yours, very respectfully,

O. W. Holmes.

Letters were also read from other distinguished members of the profession, but our limits will not allow us to give them. The exercises afforded the highest gratification to the numerous guests, and were every way worthy of the institution, the prosperity of which was thus happily celebrated.

Recent American Decisions.

Court of Common Pleas, Pennsylvania, Lancaster County, April Term, 1844.

Lancaster Savings Institution *v.* Reigart.

The act of the 16th of July, 1842, which allows a stay of execution for one year, if the defendant's property does not bring two-thirds of its appraised value at sheriff's sale, is unconstitutional and void as to mortgages executed before its passage; for the reason that a mortgage is in substance a contract, and cannot be impaired by an act of the legislature. (See the decision of the supreme court of Pennsylvania in *Moore* v. *Chadwick*, 7 Law Reporter, 433.)

It seems, the defendant, in order to obtain the stay of execution allowed by the act of 16th of July, 1842, must pay the interest due on the debt or judgment before the sheriff's sale takes place, otherwise he may not only cure irregularities in holding the inquest, but waive the stay allowed by the act.

Quere, whether, under the act of 16th of July, 1842, the sheriff must give the defendant notice of the time and place of making the appraisement.

Lewis, President. This is an application to set aside the sheriff's

sale of the defendant's real estate. On the 1st of August, 1839, Mr. Reigart, the defendant, obtained the loan of a sum of money from the Savings Institution, and executed thereupon a bond and mortgage to secure the payment of the said sum — the principal on or before a certain day therein named, and the interest, as it accrued, at certain periods stipulated. After these instruments were executed, to wit, on the 16th of July, 1842, the legislature of Pennsylvania passed an act declaring, that "in all cases where lands have been, or hereafter shall be levied upon by virtue of any writ of *fieri facias*, or other writ of execution, the sheriff shall cause the same to be valued by twelve men, and return the appraisement to the court with the writ, and if upon a writ to sell the premises they cannot be sold for two-thirds of the appraised value of the same, the sheriff shall not make sale thereof, but shall make return of the same to the court, and thereupon all further proceedings for the sale of such lands shall be stayed for one year from the return of the writ." On the 11th of August, 1843, a *scire facias* was issued upon the mortgage, in pursuance of the act of assembly prescribing the mode of proceeding for the sale of mortgaged premises in default of payment, and on the 21st of October, 1843, a report of arbitrators was filed, which, by a law of the state, has the effect of a judgment of the court of common pleas, in favor of the plaintiff, for the sum of $2,512 57, and on the same day execution was stayed by consent until the 1st of March, 1844. On the 9th of March, 1844, a writ of *levari facias* was issued, by which the sheriff was commanded to sell the property for the purpose of raising the money due upon the mortgage. On the 20th of March, 1844, the property was appraised at $3,000. On the 6th of April, 1844, it was sold by the sheriff for the sum of $2,830. On the 15th of April, 1844, the sheriff's deed to the purchaser was presented for acknowledgment, and thereupon a motion was made to set aside the sale. The grounds of complaint were stated to be two. *First*, that the property was not sufficiently described in the sheriff's advertisement. *Second*, that no notice was given to the defendant of the time and place of the appraisement or sale.

The description given in the sheriff's advertisement, corresponds with that furnished by the defendant himself in the mortgage, and appears to contain everything material to be stated in the notice of sale. The first objection is, therefore, unsustained.

In addition to the publication of the notice of sale as required by law, the sheriff left a copy at the residence of the defendant: placing one copy inside of the house, and attaching another to the outside of the building, on a conspicuous part of the wall. The

defendant was absent from his house at the time the notice was left, but it does not appear that the sheriff knew where to find him, or that he had changed his residence. The notice must, therefore, have the effect of a notice left at the defendant's place of abode. It appears, also, that he attended at the sale, and furnished what was stated to be a more perfect description of the property, which was read to the bidders and others. Under these circumstances, it is considered that the sheriff did all in his power to comply with the provisions of the law respecting the notice of sale, and that the notice given was sufficient.

But it does not appear that any notice was given of the time and place of making the appraisement, and although the property has been sold for more than two-thirds of the appraised value, it is complained that the defendant has been injured by an assessment at a less value than would have been placed upon the property, if he had been notified and heard. To this it is answered by the plaintiff's counsel, that notice is not required by the act, and if required, that it is immaterial in this case, because the stay-law of 16th July, 1842, so far as regards mortgages executed before its passage, is unconstitutional. Under the act of 1705, it was not thought necessary to give the defendant notice of inquisitions to extend or condemn real estate taken in execution. (4 Yeates, 21.) But this construction was not satisfactory, and under the act of 1806 a different rule was established. (2 Binn. 215.) Although the act of 1842 is silent upon the subject of notice, there is nevertheless a hardship in permitting any important proceedings to be taken in a cause without notice to the party to be affected. It will not be necessary, however, to determine this point, as the case will be decided upon other grounds, which seem free from doubt.

The appraisement is required by the act of 1842, in order that the defendant may obtain the stay of execution upon complying with the terms required by that act; but it is provided that, "*before* he shall be entitled to such stay of execution, he shall pay the interest due on the debt," &c. No payment or offer of payment of interest has been made in this case. The principal object was the stay; the right to that depends upon the payment of interest. The appraisement is only necessary to govern the proceedings of the sheriff, if the interest be paid before the sale. But if the interest be not paid, the appraisement would seem to become inoperative. An omission to pay the interest before the sale, might not only cure irregularities in holding the inquest, but might amount to a waiver of the appraisement and the stay of execution offered by the act of 1842. This view of the case, however, has not been insisted upon

by the plaintiff's counsel, and we therefore proceed to consider the constitutional grounds upon which he relies, in order to sustain these proceedings.

The constitution of the United States declares, that "no state shall pass any law impairing the obligation of any contract," and the constitution of Pennsylvania prohibits her legislature from "making any law impairing contracts." Is a mortgage a contract? It does not require any great degree of legal acumen, or any great weight of authority, to determine this question. A mortgage is, in *form*, a *conveyance* of land; but, under the ameliorating influence of equity principles, and the operation of our act of assembly under which this sale has been made, a mortgage is in *substance* a *contract*, by which real estate is pledged for the payment of a debt, and liable to be sold by the sheriff, in case of default, at any time upon the expiration of a year and a day after the whole sum becomes due. If the mortgage be regarded as a *formal conveyance* of land, the case of *Fletcher* v. *Peck*, (6 Cranch, 87,) is an authority to show that such an instrument is a *contract*, the obligation of which cannot be impaired. If it be regarded as an *unexecuted contract*, by which a particular property is pledged and agreed to be sold for the payment of a debt, it falls precisely within the letter of the constitution by which it is protected from legislative violation. If the bond or note which formed a part of the transaction, be taken into view, we have the authority of Chief Justice Marshall, in *Sturges* v. *Crowninshield*, (4 Wheat. 122,) for the principle, that "a promissory note for the payment of money on a certain day, is a *contract* creating an obligation to pay the money *on that day*, and that any law which releases a part of this obligation, must, in the literal sense of the word, *impair* it." We have, therefore, in this case, the double obligation of two contracts, one contained in the bond, the other in the mortgage, given to secure its payment on the day stipulated by the parties.

Does the act of 1842 impair the obligation of these contracts? It is material to the case that the mortgage was executed before the passage of that act, and that under the law which existed at the time of the contract, the defendant was entitled to a stay of proceedings for the period of a year and a day after the time of payment fixed upon in the contract. It is also worthy of consideration, that long after the expiration of this stay, and after suit was brought and judgment obtained, a further stay of execution of upwards of four months was entered upon record by consent of parties. The present is an effort to procure still another year's stay of proceedings, by virtue of the retroactive operation of the act of 1842.

A violation of contract is an act of injustice which receives no support from religion or morals; and it is among the earliest lessons of the horn-book, that injustice of every description stands opposed to the dictates of sound policy. Such a proceeding is, at best, but removing a hardship from one who contracted to bear it, and placing it upon the shoulders of another who was before free from the burthen. It is relieving one who had received a compensation for bearing the charge, and burthening another who had paid the price of exemption. It is a preference of the debtor over the creditor, amounting in effect to a *repudiation* of the contract between them. The business of life is so dependent upon the fulfilment of contracts, that "no one can safely move a step, or even sit still, without reposing confidence in the engagements he makes with his fellow men." National and individual prosperity are so interwoven with the preservation of public and private credit, that it is one of the highest duties of government to preserve good faith as well in its own transactions as among the people.

It is not denied that a state may "*modify* the *remedy* for *enforcing* the *performance* of a contract, without impairing its obligation." (4 Wheat. 122.) But "if the acts of a state so change the nature and extent of existing remedies, as materially to impair the rights and interests of a party, they are just as much a violation of the contract as if they directly overturned his rights and interests." (Story, J., in 8 Wheaton, 1.) The obligation of the contract, which the constitution preserves from violation, must necessarily mean the *legal obligation* by which a party is compelled to perform his engagement or pay damages for the breach. In other words, the *obligation* consists of the *remedies* which the *law* of civil society furnishes in substitution for those which might have been resorted to in a state of nature. Every one yields up to society his natural right to redress his own injuries, in return for the *remedies provided by law*. But if these remedies are taken away, he is left in a worse condition than if he had continued in a state of nature, alike uninjured and unprotected by constitutions, governments and laws. When all the remedies to enforce performance are taken away by civil society, there is no obligation remaining except that which the conscience of every honest man imposes upon himself. This, however, is only a moral obligation, which is of no force among the dishonest, which cannot be impaired by any human enactment, and which it would have been folly to protect by constitutional provision. The pretension that the legislature can take away the existing remedies for enforcing performance of a contract, without impairing its legal obligation, is a dangerous heresy which, at this day, has but few advocates.

Can the remedies be *suspended* without imparing the obligation of the contract? In *Sturges* v. *Crowninshield*, Chief Justice Marshall conceded, that the constitutional prohibition included "laws *extending the time of payment* beyond that stipulated in the contract, and laws allowing judgments to be paid *by instalments*." "It is probable," says the chief justice, "that laws such as those were most immediately felt, and produced the loudest complaint at the time the constitution was adopted." It is true that suspending the remedy for a year is not so serious a violation of the contract as taking it away forever. The one is a total destruction of its legal existence, the other only "*impairs*" its obligation. The difference is only in the *degree* of the injury inflicted; there is none in the principle involved. In both cases the contract is violated. The people have not entrusted their representatives with such a despotic power. On the contrary, each house is entrusted with the "powers necessary for a branch of the legislature of a "FREE STATE." It cannot be necessary in "a free state," to deny to the people, who are in fact the ruling authority of the country, the privilege of making their own contracts, or the right of enforcing them according to the laws existing and in contemplation of the parties at the time they were made. It is a provision of the fundamental law, that "all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have *remedy* by *due course of law*, and right and justice shall be administered without sale, denial, or *delay*." Of what avail is the constitutional injunction that the party aggrieved shall have *remedy*, if the legislature may take the remedy away? Of what avail is the provision in favor of the "*due course of law*," if the course of law may be suspended or obstructed? Of what advantage is the requirement that justice shall be administered "without *denial* or *delay*," if the legislature may pass laws under which the just obligations of the most solemn contracts may be suspended, and justice be both *denied* and *delayed* for a long period of time? If the remedy may be suspended for a year, there is nothing to prevent a suspension for a longer period. If the power to suspend the remedy exists, there is nothing to prevent a perpetual suspension. It is conceded that the legislature may pass laws regulating the remedies and suspending them, so far as respects contracts made after their enactment. It is also conceded, that the legislature may discharge the person of the debtor from imprisonment, upon giving up his estate for the benefit of his creditors. "Imprisonment of the debtor is no part of the contract, and a release of the person does not impair its obligation." This is the language of Chief Justice Marshall, and it is par-

ticularly true with regard to all contracts made in Pennsylvania since the adoption of her constitution. It is a constitutional provision that "the person of the debtor, where there is not strong presumption of fraud, shall not be continued in prison, after delivering up his estate for the benefit of his creditors." But the property of the debtor is liable for his contracts, and to release that impairs their obligation. (4 Wheaton, 122.) A release of the debtor's property for the period of a year, is as much within the prohibition as a perpetual release; and upon this principle a statute of Illinois, substantially similar to the one under consideration, was held by the highest judicial authority in the Union to be unconstitutional, so far as regards mortgages executed before its passage. *Brownson* v. *Kenzie*, (1 Howard's Rep. 311.[1])

This opinion is of course confined to the case before the court. It is presumed that the legislature did not intend the general expressions of the act of 1842 to operate upon mortgages executed before its passage. There is ample scope for the operation of the law upon cases subsequently arising, and upon cases where there was no specific pledge of property by contract. As the members of the legislature are under oath to support the constitution, it is the duty of the courts to reconcile their acts with that instrument, if possible. It is not every general expression in a legislative act that should be construed into a violation of the constitution. But if the act of 1842 was intended to operate upon cases like the one before the court, it is our duty to obey the constitutional mandate of the people, in opposition to the unauthorized acts of their servants. So far as the law may be understood to operate upon mortgages executed and recorded before its passage, it is unconstitutional and void.

The motion to set aside the sale is overruled, and the acknowledgment of the sheriff's deed received.

Reah Frazer, for the plaintiff.

Thaddeus Stevens, for the defendant.

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[1] This case is reviewed and confirmed in *McCracken* v. *Hayward*, (2 Howard, 608,) published since the above opinion was written, and that case goes the length of declaring all laws which provide against the sale of property under an execution, unless the price bid for it shall reach a fixed amount, unconstitutional, so far as relates to judgments owing at the time such laws were passed.

Circuit Court of the United States, Massachusetts, May Term, 1845, at Boston.

THE FARMERS AND MECHANICS BANK *v.* WILLIAM STICKNEY AND ANOTHER.

A, under an authority from B, to purchase butter and cheese for B, and to draw on him for the purpose of paying for the same, which authority was to expire at a specified time, made such purchases, and drew drafts on B, which were discounted at the Farmers and Mechanics Bank. Three of those drafts, two for $4000 each, and one for $2000, were drawn after the expiration of the authority, and were refused acceptance by B; the two former were drawn to pay for purchases made prior to such expiration, but the latter was not, although A falsely stated to the officers of the bank that it was. A had an authority from B to draw for $2000 for another purpose, which authority he never communicated to the officers of the bank. It was *held*, that B was liable for the two drafts of $4000 each, but not for the draft of $2000.

A having assigned to the bank his claim against B, in trust to apply the proceeds in payment of all his debts to the bank, and a suit having been brought thereon, and referred to arbitrators, who awarded a certain sum, which was paid by B to the bank accordingly, and the bank having brought an action against B upon the drafts, it was *held*, that the terms of the assignment must govern the appropriation of the payment, and that A's debts to the bank being the three drafts beforementioned, the payment was to be appropriated upon them *pro rata*, 4-5 to the two drafts of $4000, and 1-5 to the draft of $2000.

THIS was an action of assumpsit on three bills of exchange, drawn by one Orkin Rood upon the defendants, in favor of Lewis Rood or order, November 22, 1836; one for $2000 and one for $4000, both payable in three months, and one for $4000, payable in four months. The drafts were refused acceptance by the defendants; and this suit was brought by the plaintiffs as indorsees, to recover the amount of the bills of exchange, upon the ground that they were drawn by Rood for the benefit, and by the authority of the defendants, and were discounted by the plaintiffs upon the credit of the defendants. The declaration contained special counts upon a promise to accept the bills; and also the money counts as for money advanced and paid for the use of the defendants. The general issue was pleaded.

At the trial, it appeared, among other evidence, that Rood, the drawer, was employed by the defendants in the spring of 1836, to purchase upon their account large quantities of butter and cheese, not exceeding certain prices, and that the agency was to end early in the month of November of the same year. Rood made purchases to a large amount under this agency, which he paid for in part by cash furnished by the defendants, and in part by the pro-

ceeds of drafts, drawn by him on the defendants, and discounted by the plaintiffs. All of these drafts were accepted and paid by the defendants, except the three upon which the present action was founded. The latter were drawn after the expiration of the agency, the extent of which, according to evidence in the case, was communicated to the president and one or more of the directors of the bank; but there was also evidence to show, that the two drafts of $4000 each were to pay for the purchases of butter and cheese, actually made before the agency expired. The draft of $2000 was in fact specially authorized by the defendants, for the purpose of procuring money to be sent by Rood to the defendants for another purpose; but the letter containing this authority was not shown by Rood to the plaintiffs. He stated to them that the draft was required for payment of amounts due on old bills, for the purchases made under the agency, which, in fact, was untrue.

Soon after the dishonor of the drafts, Rood brought an action in the circuit court in Boston, against the defendants, for the supposed balance due him under the agency, and also for damages sustained by reason of the dishonor of the drafts, which suit was ultimately referred to arbitrators. On the 24th of December, 1836, Rood made an assignment to the plaintiffs, which, after reciting that he owed them $10,000 or thereabouts upon the three drafts, proceeded to assign to the bank the claims of Rood against the defendants, in trust, to apply the proceeds, after deducting expenses, "towards the payment and satisfaction of all moneys due or owing from the said Rood to the said Farmers and Mechanics Bank," and to pay the balance, if any, to Rood or his assigns. There was also a clause, giving authority to the bank to prosecute the suit, or any other suits to recover the demands assigned. The proceedings before the arbitrators were conducted by persons employed by the bank. In June, 1840, the arbitrators awarded the sum of $4,962 35, as due by the defendants to Rood. In the proceedings before the arbitrators, no credit was given to the defendants for the drafts so dishonored, and no credit was claimed by them therefor.

The defendants contended, (1.) That the award and proceedings under the arbitration by the plaintiffs, were an estoppel of their demands in the present suit. (2.) That Rood had no authority to draw the drafts on the defendants now in controversy, so as to bind them to accept and pay the same. (3.) That the bank did not discount the drafts on the credit of the defendants, but solely on the credit of Rood and the payee. (4.) That the evidence did not establish that the drafts were drawn in order to pay for butter

and cheese purchased for the defendants. (5.) That the defendants, at all events, were not liable for the draft of $2000, as the same was not drawn in pursuance of the authority given by the letter before referred to; but was drawn upon a false statement made by Rood.

The court after summing up the evidence applicable to these points, left the case to the jury upon the evidence, with the suggestion that upon the first three points, the evidence seemed to preponderate in favor of the plaintiffs, and, as to the fifth point, that the defendants were not, upon the admitted facts, liable upon the $2000 draft. Upon this suggestion, the counsel agreed that the jury should give a verdict for the plaintiffs in the sum of $10,000; and that it should be referred to an auditor to settle the exact amount, according to the suggestion of the court; and that the verdict should be amended accordingly.

The case was referred to George T. Curtis, as auditor, who, after hearing the parties, reported the amounts due upon the several drafts, and also the amount of the award, deducting the costs and expenses. The report stated further, that the plaintiffs' counsel claimed the right to appropriate the money received under the award, after deducting the charges, being $3,823 48, first to extinguish the draft for $2000, and then to apply the balance towards the two drafts found by the verdict, as due from the defendants to the plaintiffs; and that, to show that the plaintiffs had never made any appropriation inconsistent with their present claim, the plaintiffs called several witnesses, who were objected to by the defendants. Their evidence was reported by the auditor, and was to the effect, that the president or directors had never directed any appropriation of the payments under the award, and that the entries were made by the cashier, without any authority from the other officers, simply to show how much was due to the bank. The case now came on to be heard upon the auditor's report.

Choate and *Crowninshield*, for the plaintiffs.

C. G. Loring and *S. Bartlett*, for the defendants.

Story, J., afterwards delivered the opinion of the court. He said that, although the question respecting the correctness of the charge to the jury, upon which the draft of $2000 was disallowed, was not open upon the present report, yet, if it were, he remained of the same opinion which he then expressed. The ground upon which the defendants were held liable for the two drafts of $4000 each, was, that they were drawn under the authority given to him

by the defendants, for the payment of debts incurred in purchases for them, and advances made by the bank with a full knowledge of his authority. But at the time the draft of $2000 was given, the authority had expired, and the bank knew the fact. The new draft was not obligatory upon the defendants, unless drawn in conformity with some new authority. It was not drawn in pursuance of such new authority, for the letter of the defendants was never shown to the bank. The original authority was limited to the amount of purchases made before the expiration of the authority. This limitation was known to the bank, and they, consequently, could not bind the defendants by any discounts, after the original authority had expired, except so far as the same were necessary to pay for the purchases, made before the expiration thereof. The draft of $2000 was not required for any such purchases so made, and the defendants ought not to be bound by it.

The remaining question was, how was the money received under the award to be appropriated? It was to be applied precisely as required by the terms of the assignment. The law made no appropriation different from the intention of the parties. By that assignment, the expenses were to be first deducted, and the balance only applied to the discharge of all the debts contemplated in the assignment, which were the three drafts now in suit. The balance must be applied to *all* the debts, and consequently, must be applied *pro rata*. Four-fifths were to be appropriated to the two drafts of $4000, and one-fifth to the draft of $2000.

To the suggestion, that an actual appropriation was made by the cashier, there were two answers, either of which would be decisive against it. First, no such appropriation was authorized by the directors, and without their authority no such appropriation could be validly made by the cashier; and in fact, the cashier testified that he himself never intended to make any appropriation. Second, under the assignment, no such appropriation could be made, unless by the positive consent of both parties, dispensing with, and recalling the original appropriation made in the assignment.

The result of the opinion of the court was, that the defendants were liable upon the two drafts of $4000 each, with interest from maturity, until the receipt of the money under the award. The expenses were then to be deducted from the award, and four-fifths of the balance, ($3,823 48) were to be credited against the amount of those drafts. Upon the balance of the two drafts, after such deduction, the plaintiffs were entitled to interest up to the time when the verdict was rendered.

ETHAN ALLEN *v.* ORISON BLUNT AND ANOTHER.

Where a patent is surrendered for imperfection in the specification, and application is made for a new and amended patent, the grant of the same by the commissioner of patents is conclusive evidence of the existence of all the facts necessary to entitle him to issue it, except in cases of fraud, and where his excess of authority is apparent on the very face of the patent.

A verdict, upon an issue in a court of equity, where there were no further proceedings had thereon, and no hearing upon the merits, is not admissible as evidence, in a subsequent suit at law between the same parties, where the same facts are in issue.

In an action for infringement of a patent, upon the question of the novelty of the invention, and the identity or diversity of two or more machines or compounds, the evidence of persons conversant with the subject as a science is, *cæteris paribus*, entitled to more weight than that of mere artisans.

THIS was an action on the case, for the infringement of a patent for an improvement in the method of constructing locks for fire-arms. The general issue was pleaded, with a special statement of matters of defence.

At the trial, it appeared that the original patent was granted November 11, 1837; that it was subsequently surrendered for some imperfections in the specification, and a new amended patent taken out January 18, 1844; and that was also surrendered for a like defect, and a new, amended patent taken out August 3, 1844. Upon the opening of the defence, the preliminary objection was taken, that the last patent was not good as an amended patent, for the reason that the specifications attached to the three patents were for different things, and not for one and the same invention; and that, consequently, the commissioner of patents had exceeded his authority in granting the present patent. (Patent Act of 1836, ch. 357.)

STORY, J., decided that, under such an application for a new patent, the commissioner of patents was bound to decide the whole law and facts arising under the same, in the first instance; and that, *prima facie*, it must be presumed that the new and amended patent had been properly and rightfully granted by him. He said he very much doubted, whether the commissioner's decision could be re-examinable in any other place, or in any other tribunal, at least unless his decision was impeached on account of gross fraud or connivance between him and the patentee; or unless his excess of authority was manifest upon the very face of the papers. It was a general rule, that where a particular authority is confided to a public officer, to be exercised by him in his discretion, upon an

examination of the facts, of which he is the appropriate judge, his decision upon those facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts. The grant of the present amended patent was therefore held to be conclusive, as to the existence of all the facts which were by law necessary to entitle him to issue it, it not appearing on the face of the patent that he had been guilty of excess of authority, and it not being pretended that it was procured by fraud.

The defence upon the merits turned upon two points. (1.) That the defendants did not use the same combination as the plaintiff, and consequently that there was no violation of his patent. (2.) That the invention patented did not belong to the patentee, he not being the first inventor thereof.

In the course of the trial, the counsel for the defendants, in support of their defence, offered in evidence the record of a suit in equity between the same parties in the circuit court of the United States for the district of New York, in which the court had directed an issue upon the same points which were now in controversy, and the jury found a verdict upon those points in favor of the defendants. But it further appeared upon the record, that no further proceedings were had upon the verdict, and no hearing was had upon the merits of the case by the court; but the plaintiff, by the leave of the court, was allowed to dismiss his own bill without any final hearing thereon. The admission of the record was objected to by the counsel for the plaintiffs.

Story, J., decided that the record was not admissible as evidence. He said that he entertained great doubts whether a verdict given in a suit at law was ever evidence of anything, but the fact that it was rendered, unless a judgment had been duly rendered thereon. But in a court of equity, the verdict could establish nothing in the case, unless adopted and sanctioned by the court.

The case was afterwards argued to the jury upon the facts.

Rufus Choate and *B. R. Curtis*, for the plaintiffs.
Franklin Dexter and *Wm. Gray*, for the defendants.

Story, J., in summing up to the jury, made some remarks upon the relative weight of the evidence of scientific men and of artisans, which subject had been somewhat discussed by the counsel. He said that, although, upon the question whether a specification expressed the mode of constructing, compounding and using the thing patented in such full, clear and exact terms "as to enable any

person skilled in the art or science to which it appertained, or with which it was most nearly connected, to construct, compound and use the same," a mere artisan, skilled in the art, might, in many cases, be an important and satisfactory witness; yet, upon the question of the novelty of the invention, and, in reference to this, the identity or diversity of two or more machines or compounds, the evidence of persons, who, although not practical artisans, were thoroughly conversant with the subject as a science, was, beyond all question, all other circumstances being equal, far the most important and useful to guide the judgment, and to enable the jury to draw a safe conclusion.

The judge then proceeded to sum up the facts, and left them to the jury. The jury were not able to agree upon a verdict.

Supreme Judicial Court, Maine, June, Adjourned Term, 1845, at Bangor.

IN THE MATTER OF CHARLES GILMAN.

By the 13th section of the 133d chapter of the Revised Statutes of Maine, justices of the peace are authorized to take depositions, and to compel the attendance of witnesses, and, upon their refusal to be sworn, to punish them for contempt, whenever any of the causes of taking exist, which are mentioned in the statute.

A mittimus for contempt should set out distinctly, that a cause is pending in court — that the deponent and adverse party were duly notified, and that a legal cause for taking the deposition exists, such as is described in the 4th section of the above-mentioned chapter.

Justices of the peace have a limited jurisdiction, and, in taking depositions, act in a ministerial rather than in a judicial character.

A commitment for contempt in refusing to testify should be "until the witness is willing to testify," and not for a limited time at all events.

CHARLES GILMAN, a citizen of Quincy, Illinois, being on a visit at Bangor, Maine, was summoned to appear before Albert G. Wakefield, Esq. a justice of the peace of Penobscot county, at the request of Woodbridge Odlin, of Exeter, New Hampshire, and give his deposition, to be used in an action of the case pending between said Odlin and Joshua W. Carr, formerly the sheriff of said county. The deponent appeared in obedience to the summons, and having been advised that the justice had no power to compel him to testify, declined testifying, alleging such supposed want of

power as a reason, and also that he was not about to depart from the state before the session of the court where it was supposed the deposition was to be used. This refusal was repeated, and the justice considered the deponent in contempt therefor, and ordered him to be imprisoned in the county jail for the term of ten days. A mittimus was accordingly drawn up by the justice, setting forth that the plaintiff had applied to him for the summons — that it was issued and duly served on the deponent — that the adverse party was duly notified, &c. — that deponent appeared and refused to testify, &c. It did not appear from the mittimus when the action was pending, neither did it show that either of the causes for taking the deposition, as anticipated by the statute, existed. The mittimus was delivered to the proper officer, who arrested the said Gilman, who, before any actual imprisonment, sued out a writ of *habeas corpus* from the supreme court, where the matter was heard.

Present, Justices *Whitman* and *Tenney*.

Kent and *Cutting* in behalf of said Gilman, contended,

1st. That a justice of the peace had no authority under the Revised Statutes to compel the attendance of a witness to give his deposition, and appearing, to compel him to be sworn; that the 13th section of c. 133 had relation only to the distance of the deponent's place of abode from the place of trial, and only authorized the taking of a deposition when that distance was within thirty miles; that sections 36 and 37 empowered certain persons therein mentioned to compel the attendance, but not the giving of a deposition, unless when brought before the magistrate on his *capias*.

2d. That the mittimus was informal and void, because it did not contain the negation that said Wakefield was "interested in the cause or was or had been counsel or attorney in the same." Sec. 2; — because it did not state for what cause the deposition was to be taken; — because the magistrate had no jurisdiction, except for cause as set forth in the 4th section, and that no such cause in fact existed in this case; and because the period of imprisonment was fixed at ten days, and not until the witness should be willing to testify.

McCrillis, on the other side, relied on the provisions of the 13th section of the 133d chapter, to support the mittimus, and for the power exercised by the justice.

Per Curiam. It becomes unnecessary for us, in delivering our opinion, to examine and adjudicate upon all the points raised by the arguments; but, for the benefit of those who practise taking depositions, we will observe, that justices of the peace, by the 13th sec-

tion, of chapter 133, of the Revised Statutes, we think, are authorized to take depositions and to compel the attendance of witnesses, and, upon their refusal to be sworn, to punish them as for contempt, whenever any of the causes exist which are mentioned in the statute. At their own peril they are to judge and to be satisfied that the cause is pending in court — that the deponent and the adverse party have been duly notified, and that a legal cause for the taking exists, such as is described in the 4th section, otherwise they have no jurisdiction, and their acts are wholly unauthorized.

In the mittimus, when issued for a contempt, these facts are to be distinctly and truly alleged, and if untrue, the magistrate must be held responsible. But the point, on which we adjudge the mittimus, in other respects irregular and void, is, in its fixing a penalty of ten days' imprisonment. Justices of the peace have a limited jurisdiction, and in taking depositions they act in a ministerial rather than a judicial capacity. Their prerogative extends so far as to compel a witness to testify, and no farther, and the penalty should be commensurate with the object in view. Whenever the witness is willing to testify and does testify, that object is obtained and the cause of justice promoted, and no further reason exists for imprisonment. Therefore, inasmuch as this mittimus fixes the imprisonment at all events for the period of ten days, and not in the alternative, we adjudge the same to be void, and accordingly Mr. Gilman is discharged from arrest.

District Court of the United States, Maine, May, 1845, at Portland.
In Bankruptcy.

IN THE MATTER OF ALBERT MARWICK.

Whether, under the bankrupt act, the creditors of a partnership can be allowed to prove claims against the separate estate of one of the partners to receive dividends, in concurrence with the separate creditors of the partner, when there is no joint estate and no living solvent partner, — *quære.*

If there be any joint fund, however small, such proof cannot be allowed, although such fund may have been created by the separate creditors purchasing some of the partnership assets, actually worthless, for the purpose only of creating it; for if there be a joint fund, the court cannot, under the statute, look behind the fact, to inquire how it has been produced.

THIS was a case of objection to a proof of a debt. Marwick, the bankrupt, in May, 1837, entered into a copartnership with one Frederic Davis, and, as partners, they purchased a quantity of pro-

visions for the Georgia Lumber Company, to the amount of $800, for which they drew their bill on the Company in favor of Bradbury. Before the bill was paid the Company failed, and the failure of the Company produced that of the copartnership of Marwick & Davis, by which the firm was dissolved. They afterwards gave their joint note for the sum remaining due, namely, $740 88. This note Bradbury, for a valuable consideration, transferred to Dole, with notice that it was a partnership debt. The assignee of Marwick & Davis rendered in his account of the joint estate, October 25, 1844, showing outstanding demands in favor of the firm, to the amount of $13,000, which comprised the whole assets of the firm, and which were all represented as utterly worthless. Dole, the creditor, proved his debt, June 17, 1842. The assignee, after rendering his first account, applied for liberty to compromise or sell a claim against the Georgia Lumber Company, which was disposed of for $40, of which a supplementary account was rendered, and the amount paid into court, April 25, 1845, to the credit of the joint estate. The final account of the assignee of the separate estate showed assets to the amount of $545 93. Two debts have been proved and allowed against the estate, one by Charles E. Marwick, for $684 04, and the debt of Dole. Marwick objected to the admission of Dole's debt against the separate estate.

Ware, J. Two questions have been raised and argued in the present case. The first is, whether the creditors of a copartnership can, in any case, be admitted to prove their claims against the separate estate of one of the copartners, for the purpose of receiving dividends in concurrence with the separate creditors of the copartner. The second is, whether, admitting that they may, in some cases, the partnership creditors can be admitted so to prove under the facts in this case.

The 14th section of the bankrupt act provides, when two or more persons become bankrupt, who are partners in trade, that separate and distinct accounts shall be kept in the settlement of their estates, of the joint effects of the firm, and of the separate effects of the several partners, and, when the whole expenses are paid, that the net proceeds of the joint property shall be applied to the payment of the joint creditors, and the separate property of each party shall be applied to the payment of his separate creditors, and that the creditors of the respective estate shall be allowed to receive dividends from the other estate only after the creditors of that estate shall have been fully paid. This is in substance the rule established by the law, and it is quite clear where there is both a joint and sepa-

rate estate, that the creditors of neither can prove against the other estate for the purpose of receiving dividends, except from the surplus remaining after its own proper creditors have been fully satisfied.

This general rule for marshaling the assets and claims, is taken from the English bankrupt law. But under that system there are exceptions, as well established as the rule itself. One of these exceptions is, where there is no joint estate, and no living solvent partner, as is the fact in the present case. In such a case, the joint creditors are allowed to prove and receive dividends against the separate estate, in concurrence with the separate creditors. Story on Partnership, § 372. Eden on Bankruptcy, 172. But to bring the case within the exception, there must be absolutely no joint estate. If there be any, however small, the exception is not allowed, and it has been rejected where the joint estate amounted only to £1 11*s.* 6*d.* And again, there must be no living solvent partner, and solvent is here used not in its ordinary sense, that is, an ability to pay the whole of one's debts, but in the sense of non-bankrupt partner. For though he may be, in fact, insolvent and unable to pay the whole of his debts, if he be not actually in legal bankruptcy, the exception is excluded, and the general rule prevails. *Ex parte Jansen*, (3 Maddox R. 229.) The principle is, that while there is any fund, however small, to which the joint creditors may resort, they cannot come against the separate estate in competition with the separate creditors; and though a person may be insolvent if he be not in actual bankruptcy, and thus divested of all his property, he may still have the ability to pay part of his debts, and this possibility is held to be enough to exclude the joint creditors from sharing in the separate estate of the bankrupt partner, except in the surplus after the separate creditors are paid.

Such is the general rule under the English bankrupt laws, and such the character of the exception to the rule, which it is supposed may be admitted under our law. Our statute has adopted the general rule, without taking notice of any of the exceptions. It does not appear to contemplate the case of there being no joint property, and as it passes it by in silence, it may be a grave question whether it does not leave such a case open to the application of the general principles of equity. But as there is a joint fund in the present case, it is immaterial whether it does or does not, unless the court may look behind the fact of there being a joint fund, to the manner in which it has been created.

It appears from the proofs in the case, or the facts which are admitted, that the assignee rendered in his first account of the

partnership estate in October, 1844, in which the whole of the assets, consisting of outstanding demands, are represented as worthless; that afterwards he applied for liberty to compromise, or collect a debt, on which he obtained $40, and rendered into court in a supplementary account; and it further appears, that the money to take up this note was actually advanced by Charles Marwick, as creditor of the separate estate. Now the argument is, that if the exception to the general rule of marshaling the assets and debts, established under the English bankrupt system, may be admitted under our statute, then, as it is founded on the general principles of equity and distributive justice, a creditor of the separate estate ought not to be permitted to defeat the equity of the joint creditor, by purchasing for a small sum a partnership demand, for which nothing could have been obtained but for this purpose. Allowing the premises, on which the argument is founded, to be correct, it does seem to present itself with some force, to the equitable consideration of the court. The effect, in the present case, will be, that the separate creditor will receive nearly the whole of his claim, and the joint creditors but a small per centage, if each is restricted to his own appropriate fund.

But after considerable reflection I have come to the conclusion, that, admitting the assumption on which the argument is founded, it cannot prevail. In the first place, if this matter is viewed as a struggle between the two classes of creditors, it is a strife on the part of the separate creditors, not *de sucro captando*, but *de damno vitando*. A creditor may, without any grave imputation in the forum of conscience, be allowed to use all fair and legal means to avoid a loss, though it may incidentally be at the expense of another creditor. And though it is a maxim in equity jurisprudence, that *equality is equity*, yet the court still holds the maxim subordinate to legal priorities, which one party may, by his diligence, acquire over another. And further, the whole subject of marshaling the assets and claims between the joint and separate creditors in bankruptcy, involves some of the most difficult problems that occur in the whole range of jurisprudence. It has hitherto been found impracticable to establish any general rule, that will meet the equities of all the various cases that come up in practice; and the courts have been finally compelled, instead of subjecting the whole to a rigorous analysis, and extracting a system of rules which will carry out the principles of natural justice, to cut down the difficulties by establishing a general rule, which at first seems conformable to general equity, and then to limit and qualify it by a number of arbitrary exceptions, in order to meet the particular

equities of particular cases. (Eden on Bankruptcy, 169–174); (Story on Partnership, § 374–382.) This system is admitted to be not entirely satisfactory; it has sometimes been departed from, and again restored, and is now adhered to, not because it is in all respects conformable to the principles either of positive law, or of natural equity, but partly as a rule of convenience, as it has been sometimes called, and partly because no system has hitherto been presented as a substitute, which is not found to be encountered by equal difficulties. *Dutton* v. *Morrison*, (17 Ves. 207); *Exparte Elton*, (3 Ves.)

If then we admit that the equitable doctrines of the English courts in the administration of their bankrupt law are applicable under our statute, how will the case stand? In the first place, if this fund had been brought into court in consequence of the purchase of this note by any other person than a separate creditor, it is clear there would have been an end of the case. What difference does it make, that he has advanced the money, and thus created the fund? It was the duty of the assignee to make the most of the assets. If with the knowledge that $40 could be obtained by the transfer of this note, he had rendered it into court as worthless, he might have been compelled to pay the money out of his own pocket. The fund would then have been produced in this way, and the joint creditor would have been in the same condition as he is now. It was not for the assignee to inquire who the purchaser was, or what were his motives in making the purchase. And even suppose that he might have done this and have refused to sell to a separate creditor for such a purpose, the creditor might have gone to the debtor and furnished him the money to take up the note, and thus indirectly obtain the same result. And indeed this seems to have been the course adopted in the present case, for the note was nominally taken, by one of the company, who was liable upon it, though the money was advanced by the creditor. So that if we were to adopt the principle of going behind the fact of there being a fund, to inquire whether that had not been inequitably created by the management of the separate creditors, the court would at once be involved in inextricable difficulties.

The object of this inquiry is to reach the supposed equity of the case, by making a more just and equal distribution of the assets between the different classes of creditors, and to prevent the separate creditors from creating out of worthless assets a small fund, for the sole purpose of preventing the joint creditors from sharing with them the separate assets. But after all, is not this supposed

equity more apparent than real? Each class of creditors originally trusted to different funds and different responsibilities, one to the social and one to the separate responsibility. The general equity would therefore seem in all cases to confine each class of creditors to that fund to which they primarily trusted, unless in a case where there had been a fraudulent or improper abstraction from one estate for the purpose of increasing the other. And this is the general rule, not only in bankruptcy, but in general equity. Each class of creditors has a right of prior payment out of the estate to which he is supposed to have given credit, and the other class can only go against the surplus. If a creditor of one partner attaches partnership property, his attachment only holds the right or interest which the parties shall be found to have in the property after an account is taken and the joint creditors are paid. (3 Kent Com. 64, 65, note c, 5th edition; Story's Partnership, § 363.) The equity of each class of creditors against their proper fund, certainly seems to be stronger than that of the other class, who never could have looked to it for their security, except so far as there might be a surplus after discharging its own proper liabilities.

The general rule therefore has its foundation in natural equity, and it is established by the law. The law itself makes no exception. Now admitting the case of there being no joint estate to be a *casus omissus*, not contemplated, and therefore not within the purview of the law, it certainly covers all cases where there is a joint fund, without inquiring into its origin. And it is a rule in the construction of statutes, that when the statute covers the whole case in all its circumstances and makes no exception, none can be made by the court.

My opinion on the whole is, that the proof cannot be admitted against the separate estate in competition with the separate creditors.

District Court for the City and County of Philadelpha, June, 1845.

JEANES *v.* DAVIS.

Damages claimed for an injury to the person of a wife during the converture are hers, and the recovery of a judgment in the joint names of husband and wife does not reduce them to the possession of the husband, and therefore they cannot be attached for his debt. *Penn. Law Jour. IV.* 406.

Digest of American Cases.

Selections from 6 Hill's (N. Y.) Reports.

BANKRUPT AND BANKRUPT LAW.

The second section of the bankrupt act of 1841, declaring certain transfers of property void, renders them so only as to persons claiming in virtue of proceedings under the act. *Dodge and M'Clure* v. *Sheldon*, 9.

2. The court will not give effect to a bankrupt discharge on motion, where the party might have pleaded it, but omitted to do so. *Lee* v. *Phillips*, 246.

3. Accordingly, where a defendant obtained his discharge during the pendency of the suit, and afterwards suffered judgment by default to be entered against him for not pleading, on which execution was issued; *held*, that the only relief to which he was entitled was to be let in to plead the discharge, on payment of costs. *Ib.*

4. Where the defendant is thus let in, the court will allow the plaintiff to discontinue without costs. *Ib.*

5. Where a judgment for costs was recovered by a sheriff, in an action on the case against him for not returning an execution, and the plaintiff afterwards petitioned for and obtained a discharge under the bankrupt act; *held*, that the judgment was a debt provable under the act, and was therefore reached by the discharge. *Graham and others* v. *Pierson, sheriff, &c.* 247.

6. *Held* further, that in such case the court would, on motion of the plaintiff, order a perpetual stay of execution upon the judgment. *Ib.*

7. Judgment having been obtained against the plaintiff upon a nonsuit ordered at the circuit, he brought error, and the defendant was afterwards discharged from the alleged cause of action under the bankrupt law. *Held*, that the plaintiff was not entitled to an order allowing him to discontinue the suit without costs, until he succeeded in reversing the judgment. *Sanford* v. *Sinclair*, 248.

8. In such case, however, the plaintiff may obtain leave to discontinue his *writ of error* without costs, on application to the court for the correction of errors. *Ib.*

9. Where, by reason of the defendant having been discharged as a bankrupt, the plaintiff becomes entitled to discontinue without costs, he will be allowed to do so, though the defendant offer to stipulate that he will waive the benefit of his discharge. Per Bronson, J. *Ib.*

10. The defendant's liability for a *tort* is not affected by his discharge under the bankrupt law, unless, before the petition in bankruptcy was presented, the demand had become a *debt*, by being converted into judgment. *Crouch* v. *Gridley*, 250.

11. A verdict or report of referees obtained by a plaintiff in an action for a tort, merely liquidates the damages, but the nature of the demand remains unchanged until judgment is perfected. *Ib.*

12. A bankrupt's discharge extends only to such debts as the bankrupt owed at the time of presenting his petition. Per Bronson, J. *Thompson* v. *Hewitt*, 254.

13. Whether the bankrupt can be relieved from a judgment recovered against him intermediate the presentation of his petition and the granting of the discharge, upon a promissory note given before his proceedings were commenced, *quere*. *Ib.*

14. A promissory note is merged in and extinguished by a judgment recovered thereon, and the judgment becomes a new debt. Per Bronson, J. *Ib.*

15. Where a defendant, during the pendency of a suit against him on a promissory note, presented a petition to be discharged under the bankrupt law, and then compromised the claim by giving a cognovit for a part of it, agreeing at the same time that any discharge he might obtain should not affect the rights of the plaintiff: *Held*, on motion by the defendant for a perpetual stay of proceedings, that his discharge obtained after judgment upon the cognovit did not entitle him to relief. *Ib.*

16. Bail in error remain liable, though the principal become bankrupt, and obtain his discharge pending the writ. Per Nelson, Ch. J. *Hall* v. *Fowler and Steadman*, 630.

17. So of bail to the action, provided the discharge be granted after they have become fixed; though otherwise if granted before. Per Nelson, Ch. J. *Ib.*

18. Where on appeal from a justice's judgment, the appellee recovered, and the appellant was afterwards discharged under the bankrupt act; *held*, that the liability of the surety in the appeal bond was not thereby affected. *Ib.*

BANKS AND BANKING.

Where a bank receives money on deposit in the ordinary way from one of its customers, the latter cannot maintain an action for it without a previous demand either by check or otherwise; and the rule is the same, though the action be for a balance struck on the customer's bank-book by one of the clerks in the bank. Cowen, J., dissented. *Downes* v. *The Phœnix Bank of Charlestown*, 297.

BILL OF EXCEPTIONS.

In general, where irrelevant evidence is allowed to be given, and the party objecting moves for a new trial on a *bill of exceptions*, the motion will be granted, without inquiring how far the evidence may have influenced the verdict. *Myers* v. *Malcolm and another*, 292.

2. On a bill of exceptions the party cannot avail himself of other grounds than those taken by him at the trial. *Hunter* v. *The Trustees of Sandy Hill*, 407.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

A state is a *corporation*, and may therefore be the payee of a promissory note. *The State of Indiana* v. *Woram and six others*, 33.

2. An innocent holder of negotiable paper, who has received it *in the usual course of trade, for a valuable consideration*, though from a person having no title and no authority to transfer it, will be protected even as against the claim of the previous owner. Per Walworth, chancellor, and Lott, senator. *Stalker* v. *M'Donald and others*, 93.

3. *Held* otherwise, however, where it appeared that the paper was received as *security for an antecedent debt* due from the person who made the unauthorized transfer, and the holder neither parted with value on the credit of it, nor relinquished any previous security. *Ib.*

4. So, even had the paper been nominally received as *payment*. Per Walworth, chancellor. *Ib.*

5. The import of the words *bona fide holder for a valuable consideration*, as used in reference to cases of this character, discussed and considered. *Ib.*

6. The case of *Swift* v. *Tyson*, (16 *Peters' Rep.* 1,) so far as it conflicts with *Coddington* v. *Bay*, (20 *Johns. Rep.* 637,) disapproved. *Ib.*

7. An instrument in the form of a bill of exchange, drawn upon and accepted by the cashier of a bank, and payable to *order*, in the city of New York, at a specified period *after date*, is entitled to *days of grace;* and evidence of a local usage cannot be received for the purpose of varying its legal effect in this particular. *The Merchants Bank of the city of New York* v. *Woodruff*, 174.

8. The agent of a company, with the assent of his principals, and in order to raise money for their benefit, drew a bill of exchange in his own name on a part of them, payable to the order of A., who indorsed it for the accommodation of the company. The drawees accepted the bill, and it was discounted by a bank and the proceeds applied by the agent in the company's business. A. was obliged to pay it on its becoming due, and he afterwards brought an action against all the members of the company to recover the amount. *Held*, that though they were not jointly liable *on the bill*, A. could recover under the common counts as for *money paid* to their use. *Allen* v. *Coit and others, impleaded, &c.* 318.

9. The agent of a company, with the assent of his principals, and in order to discharge their debt, drew a bill of exchange in his own name on a part of them, payable to the creditor, which, after being accepted, was indorsed and delivered to a third person, who brought an action against all the members of the company to recover the amount. *Held*, that there was no privity between them and the plaintiff, and that an action was not maintainable either upon the bill itself or the original consideration. *Rogers* v. *Coit and others*, 322.

10. Otherwise, had it clearly appeared that the name in which the bill was either drawn or accepted was one of those by which the company allowed themselves to be known and represented. Per Cowen, J. *Ib.*

11. In general, where an action is brought on a note by an indorsee or other third person not named in it, he will be presumed to have taken it in the usual course of negotiating commercial paper; and the *onus* will be upon the maker, if he seek to avail himself of any equities existing between him and the payee, to show the facts impeaching the plaintiff's title. Per Bronson, J. *Nelson* v. *Cowing & Seymour*, 336.

12. Otherwise, if the action be brought by the person *named as payee*, although he was a stranger to the transaction upon which the note was given, and knew nothing of the making of it at the time. In such case, unless the plaintiff prove that he took the note before it became due, and paid value for it, the defence is admissible. *Ib.*

13. A party may become an indorser of a bill or note by any mark or designation he chooses to adopt, provided it be used as a substitute for his name, and he intend to be bound by it. Per Nelson, Ch. J. *Brown* v. *The Butchers' & Drovers' Bank*, 443.

14. An indorsement is valid though written with a lead pencil. *Ib.*

15. Where a party placed the figures "1, 2, 8," upon the back of a bill of exchange, by way of substitute for his name, intending thus to bind himself as indorser; *held*, a valid indorsement, though it appeared he could write. *Ib.*

16. Where the payee of a usurious note indorsed it to a third person, for a valuable consideration, who took it without notice of the usury, and afterwards brought an action against the payee, seeking to charge him as indorser; *held*, that the indorsement amounted to a new and independent contract between the parties, and that the usury was no defence. *M'Knight* v. *Wheeler*, 492.

17. A note dated on the 15th, and made payable to L. or bearer in six months, was transferred by L. on the 29th, with an indorsement upon it signed by him in these words — "I guaranty the payment of this note." *Held*, in an action brought by R. to recover the amount of the note, that L. was liable as *indorser*, on proof of demand and notice, though it did not appear that the guaranty was made to R. *Leggett* v. *Raymond*, 639.

18. *Semble*, however, that R. could not recover against L. as *maker*, without other proof. *Ib.*

CARRIER.

Where goods are delivered to a carrier, marked for a particular destination, without any directions as to their transportation and delivery, save such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, whether the consignor knew of the usage or not. *Van Santvoord and others* v. *St. John & Tousey*, 157.

2. In an action to recover the value of goods entrusted to the defendants for transportation, it appeared that they were engaged in the carrying business on the Hudson river, by means of a line of tow-boats, which ran between New York and Albany, and were not interested in any transportation line west of the latter place; that they received on board one of their boats, from the plaintiffs, a box of goods marked "J. P., Little Falls, Herkimer Co.," and gave a receipt for it in these words, "Rec'd of J. & T., [the plaintiffs,] on board the tow-boat, &c. [naming it,] a box of merchandise marked J. P., Little Falls, Herkimer Co.;" that the plaintiffs gave no special directions as to the place where the box was to be delivered, nor as to the mode of delivery; that upon its arrival at Albany the defendants delivered it safely on board a canal boat belonging to a responsible line, whose route lay through Little Falls, this be-

ing in accordance with the uniform usage of all carriers between New York and Albany, in similar cases; and that before the canal boat reached Little Falls the box was broken open and rifled of its contents. *Held* that, though the plaintiffs were ignorant of the usage mentioned, the circumstances were insufficient to make out a contract on the part of the defendants to deliver the box at Little Falls, and that their responsibility as *common carriers* ceased at Albany, where they became mere *forwarders*. *Ib.*

3. *Held* further, that as the mode in which the defendants forwarded the goods from Albany was in accordance with the uniform usage of the business in which they were engaged, and no want of care on their part in selecting a proper vehicle was shown, they were not liable. *Ib.*

4. Trover may be maintained against a common carrier where the goods entrusted to him are lost by his *act*, though without any wrongful intent; as where he delivers them to the wrong person by mistake, or under a forged order. Per Bronson, J. *Hawkins* v. *Hoffman*, 586.

5. But if the goods are lost through the mere *omission* of the carrier, trover will not lie even after demand and refusal, but the owner should bring either assumpsit or special action on the case. *Ib.*

6. The usual contract of a carrier of passengers includes an undertaking to receive and transport their *baggage*, though nothing be said about it; and if it be lost, even without the fault of the carrier, he is responsible. *Ib.*

7. The term *baggage* in such cases does not embrace samples of merchandise carried by the passenger in a trunk with a view of enabling him to make bargains for the sale of goods. *Ib.*

8. Nor does the term embrace money in the trunk, or articles usually carried about the person and not as baggage. Per Bronson, J. *Ib.*

9. Otherwise, however, as to articles for the personal use, convenience, instruction or amusement of the passenger on the way, and usually carried as baggage; e. g. wearing apparel, brushes, writing materials, books, fishing tackle, &c. Per Bronson, J. *Ib.*

10. Money to pay travelling expenses, carried in the passenger's trunk, is not included in the term *baggage*. *Semble*. *Ib.*

CASES OVERRULED, DOUBTED OR EXPLAINED.

Acker *v.* White, (25 Wend. 614,) commented on and explained. *Burkle & Gebhard, ex'rs, &c.* v. *Luce*, 558.

Beekman *v.* Lansing, (3 Wend. 446,) commented on and explained. *Bussing and Bussing* v. *Bushnell*, 382.

Bradyll *v.* Ball, (1 Bro. Ch. Rep. 427,) commented on and explained. *Burkle & Gebhard, ex'rs, &c.* v. *Luce*, 558.

Burr *v.* Van Buskirk, (3 Cowen, 263,) commented on and explained. *Webber & Cody* v. *Shearman*, 20.

Butler *v.* Van Wyck, (1 Hill, 438,) commented on. *Vance, by his next friend* v. *Phillips, late sheriff, &c.*, 433.

Christman *v.* Floyd, (9 Wend. 340,) commented on and explained. *Webber & Cody* v. *Shearman*, 20.

Edmondstone *v.* Thompson, (15 Wend. 554,) explained. *Johnson* v. *Comstock*, 10.

Foot *v.* Gumaer, (12 Wend. 195,) overruled. *Gansevoort* v. *Nelson and others, executors, &c.*, 389.

Fox *v.* Baker, (2 Wend. 244,) disapproved. Per Bronson, J. *Lovett* v. *Cowman, impleaded, &c.*, 223.

Frey *v.* Leeper, (2 Dall. 131,) commented on and explained. *Burkle & Gebhard, ex'rs., &c.* v. *Luce*, 558.

Gibson *v.* Colt, (17 Johns. Rep. 390,) was much shaken, if not entirely overthrown, by the decision in Sandford *v.* Handy, (23 Wend. 260.) Per Bronson, J. *Nelson* v. *Cowing & Seymour*, 336.

Gilman *v.* Rives, (10 Peters' Rep. 299,) commented on and explained. Per Walworth, chancellor. *Burgess* v. *Abbott & Ely*, 135.

Hanford *v.* Artcher, (4 Hill, 271,) commented on. *Vance, by his next friend* v. *Phillips, late sheriff, &c.*, 433.

Hanmer *v.* Wilsey, (17 Wend. 91,) explained. *Johnson* v. *Comstock*, 10.

Harvey *v.* Skillman, (22 Wend. 571,) cited and explained. *Knapp* v. *Curtiss and others, executors, &c.*, 386.

Inman *v.* Foster, (8 Wend. 602,) commented on and disapproved. *Root* v. *Lowndes*, 518.

Jackson, ex dem. Parker *v.* Phillips, (9 Cowen, 94,) so far as it holds that

one who affixes his name to an instrument after its execution, without being requested, is a good subscribing witness, disapproved. Per Bronson, J. *Hollenback* v. *Fleming*, 303.

Klock *v.* Cronkhite, (1 Hill, 107,) commented on and explained. *Arnot* v. *Post and others*, 65.

Miller *v.* Van Anken, (1 Wend, 516,) commented on and explained. *Van Slyke* v. *Lettice*, 610.

Murray v. Riggs, (15 Johns. Rep. 571,) has been overruled. Per Bronson, J. *Goodrich* v. *Downs*, 438.

Potter *v.* Etz, (5 Wend. 74,) commented on and explained. *Gansevoort* v. *Nelson and others, executors, &c.*, 389.

Retan *v.* Drew, (19 Wend. 304,) explained. *Johnson* v. *Comstock*, 10.

Rockfeller *v.* Donnelly, (8 Cowen, 623,) adverted to and questioned. Per Bronson, J. *Aberdeen* v. *Blackmar*, 325.

Slocum *v.* Despard, (8 Wend. 615,) commented on and questioned. Per Bronson, J. *Root* v. *Woodruff*, 418.

Small *v.* Bixley, (18 Wend. 514,) overruled. *Johnson* v. *Fellows*, 353.

Striker *v.* Mott, (6 Wend. 465,) explained. *Randell* v. *Crandall*, 342.

Swift *v.* Tyson, (16 Peters' Rep. 1,) so far as it conflicts with Coddington *v.* Bay, (20 Johns. Rep. 637,) disapproved. *Stalker* v. *M'Donald and others*, 93.

Thomas *v.* Croswell, (7 Johns. 264,) commented on and disapproved. *Root* v. *Lowndes*, 518.

Watson *v.* Davis, (19 Wend. 371,) commented on and explained. *Hall and others* v. *Tuttle*, 38.

Webber *v.* Shearman, (6 Hill, 20,) commented on and limited. *Bell* v. *Potter*, 497.

Wickware *v.* Bryan, (11 Wend. 585,) commented on, and the reporter's abstract corrected. *Jones* v. *Thompson*, 621.

Woglam *v.* Cowperthwaite, (2 Dall. 68,) commented on and explained. *Burkle & Gebhard, ex'rs, &c.* v. *Luce*, 558.

CONSTITUTIONAL LAW.

To constitute a *bill of credit* within the meaning of Art. 1, § 10 of the constitution of the United States, the paper must be such as is designed to circulate as money or answer the ordinary purposes of coin. *The State of Indiana* v. *Woram and six others*, 33.

2. A person may renounce a constitutional provision made for his own benefit. *Baker* v. *Braman*, 47.

CONTRACT.

In general, the law of the place where a contract is to be *performed*, and not that of the place where it was *made*, is to govern in determining its validity and effect. *The Commonwealth of Kentucky* v. *Bassford and Nones*, 526.

2. An action was brought on a bond conditioned for the faithful performance of the duties enjoined by a law of Kentucky authorizing the obligees to sell *lottery tickets* for the benefit of a college in that state. *Held*, that as the bond was valid at the place where the condition was to be performed, the courts of this state should uphold it, notwithstanding our statute against lotteries. *Ib.*

3. Otherwise of a bond or obligation executed to carry into effect a foreign law sanctioning what is plainly contrary to morality, &c. Per Nelson, Ch. J. *Ib.*

4. A "call" from a presbyterian congregation to a minister, drawn in the words prescribed by the forms and discipline of that church, (*Const. of Presb. Church, p.* 438, *Art.* 6, *ed. of* 1842,) and signed by three elders and a trustee, does not bind them to pay the minister's salary, but is to be regarded as the act of the congregation. *Paddock* v. *Brown and others*, 530.

5. *Semble*, that the "call" relates exclusively to the *spiritual* concerns of the congregation. Per Nelson, Ch. J. *Ib.*

COURT OF A JUSTICE OF THE PEACE.

Though it appear on a trial in a justice's court from the plaintiff's own showing that the *title to lands* is in question, and the justice improperly refuse to dismiss the cause, his judgment will not be *void* for want of jurisdiction, but only *voidable* for error. Per Cowen, J. *Koon* v. *Mazuzan*, 44.

2. The justice may properly proceed and render judgment, notwithstanding evidence of title to lands be given by the plaintiff, if the defendant do not expressly *dispute* such title, nor move to have the cause dismissed. *Ib; Adams* v. *Beach and Start*, 271.

3. A summons issued by a justice, stating a cause of action exceeding in

amount the jurisdiction of the court, is a nullity, and lays the defendant under no obligation to appear. *Semble.* *Yager* v. *Hannah*, 631.

4. A summons was issued by "The justices' court in the city of Hudson," requiring the defendant to appear and answer the plaintiff "in a plea of trespass on the case to his damage of *one hundred dollars*." As the amount thus claimed exceeded the jurisdiction of the court, that being limited to *fifty dollars*, the defendant did not appear, and the plaintiff proceeded and took judgment for *twenty-five dollars*. *Held*, that the court had no jurisdiction, and the judgment was therefore reversed. *Ib.*

5. Otherwise, *semble*, had no amount been stated in the summons. *Ib.*

6. A declaration in a justice's court claiming damages to an amount beyond the limit of its jurisdiction is bad. Per Beardsley, J. *Ib.*

7. Otherwise, however, if the declaration, after setting forth a cause of action, exceeding in amount the jurisdiction, claim damages within its limit. Per Beardsley, J. *Ib.*

8. The summons and declaration in a justice's court must agree in respect to the names and number of the defendants. *Semble.* *Leggett* v. *Raymond*, 639.

9. Where the summons, however, was against L. and V., but was not served upon V., and the declaration was against L. alone, who pleaded the general issue; *held*, that the plea amounted to a waiver of the irregularity. *Ib.*

DAMAGES.

In an action for assault and battery, though it appeared that the defendant had been prosecuted criminally for the same matter, and fined $250, which he had paid; *held*, that the plaintiff might nevertheless recover *exemplary* damages, if the jury thought proper to allow them. *Cook* v. *Ellis*, 466.

2. The fact that the defendant has been punished criminally for the assault and battery cannot be given in evidence to mitigate damages in the civil suit if the plaintiff object. *Semble.* *Ib.*

3. After conviction upon an indictment for an assault and battery, the court may, with a view to the measure of punishment, suspend judgment until the decision of a civil action pending for the same cause. *Semble.* *Ib.*

4. The proceedings in the civil action, however, will not be stayed for the purpose of awaiting the event of the criminal prosecution. *Semble.* *Ib.*

5. In general, to maintain a claim for *special damages*, they must appear to be the legal and natural consequence of the wrong complained of, proceeding exclusively from that, and not from the improper act of a third party remotely induced thereby. *Crain* v. *Petrie*, 522.

6. A bank, having received from the plaintiff a note for collection, employed a notary to attend to the business, who afterward returned the note to the bank with a certificate of protest and of notice sent to the indorser; whereupon a suit was commenced against the indorser by the plaintiff, in which the former proved that the notice sent was defective, and the plaintiff failed to recover. He then brought assumpsit against the bank for a breach of the implied undertaking to give due notice; alleging, among other things, that the note was valueless without the responsibility of the indorser. *Held*, that the bank was not liable for the costs and expenses incurred in prosecuting the indorser, but only for the amount of the note with interest. *Downer* v. *The Madison County Bank*, 648.

DISORDERLY PERSONS.

A statute authorizing a magistrate to convict one who abandons or neglects to provide for his wife, &c., of being a disorderly person, and to require sureties for his good behavior, though it do not give the right of *trial by jury*, is nevertheless constitutional. *Duffy* v. *The People*, 75.

2. In an action on a recognizance taken in such case, the sureties may defeat a recovery by pleading and proving, notwithstanding the conviction, that the woman alleged to have been abandoned or left unprovided for by their principal, was not in fact his wife. *Ib.*

3. Where the issue is upon that question, the conviction is not even *prima facie* evidence against the sureties. Per Walworth, chancellor. *Ib.*

DOWER.

In ejectment for dower, it appeared that the husband, a few days before his

marriage with the plaintiff, conveyed the lands in question to one of his children by a former marriage, as an advancement, with the intention of preventing the plaintiff from acquiring a right of dower, and that she knew nothing of the conveyance until after the marriage had taken place. *Held*, that the conveyance was nevertheless valid, and that the action could not be maintained. *Baker* v. *Chase*, 482.

2. *Semble*, that the widow would not be entitled to relief in such case even in equity. *Ib.*

EJECTMENT.

In ejectment brought as a substitute for a writ of right to enforce a claim which accrued before the revised statutes took effect, an adverse possession of *twenty-five* years must be shown in order to bar the action. Per Beardsley, J. *Cole, Coe and Coe* v. *Irvine*, 634.

2. Otherwise if the case be one in which a writ of right could not have been maintained. *Ib.*

3. Where the action is brought by *two* out of *three* or more tenants in common, claiming an undivided interest *jointly*, it cannot be maintained as a substitute for a writ of right, and therefore an adverse possession of *twenty* years will operate as a bar. *Ib.*

4. Tenants in common of real estate have not a joint *property;* though otherwise as to their *possession*. Per Beardsley, J. *Ib.*

5. Under a declaration in ejectment, claiming an undivided *half* or *third* of the premises, the plaintiff cannot recover *two-sevenths*. *Ib.*

EVIDENCE.

Parol evidence is not admissible in a court of law to show that a deed absolute on its face was intended as a mortgage. *Webb* v. *Rice and another*, 219.

2. Whether such evidence is admissible even in a court of equity, except upon the ground of fraud, mistake or surprise, in making or executing the deed, *quere*. *Ib.*

3. All the members of a company are chargeable with knowledge of the entries made on their books by their agent in the course of his business, and with the true meaning of the entries as understood by the agent. Per Cowen, J. *Allen* v. *Coit and others, impleaded, &c.*, 318.

4. Accordingly, in an action against the company, if there be anything obscure in the entries, the plaintiff may prove by the agent what was meant. *Ib.*

5. Declarations made by the owner of a chose in action are not admissible to affect the rights of one subsequently deriving title from him. *Stark* v. *Boswell*, 405.

6. This rule applies to declarations made by a mortgagee of lands, before the mortgage is due, when offered in evidence to affect the rights of a purchaser under it, though the mortgagee be dead at the time of the trial. *Ib.*

7. A parol disclaimer of ownership made by the plaintiff in ejectment may be given in evidence against him to characterize his possessory acts, though not for the purpose of affecting an existing paper title. *Hunter* v. *The Trustees of Sandy Hill*, 407.

8. The credibility of a witness is in general a question for the jury; and it is seldom proper for the judge to instruct them that they have no right to believe the witness. *Conrad* v. *Williams*, 444.

9. But it is sometimes proper for the judge to instruct the jury as to the rules or principles which should guide them in determining questions of this character. Per Bronson, J. *Ib.*

10. In order to prove the incorporation of a religious society, the original certificate filed under the statute must be produced; the *record* of the certificate is not primary evidence. Per Nelson, Ch. J. *Paddock* v. *Brown and others*, 530.

11. The question whether a witness is competent, though depending upon conflicting evidence, is for the *court* to decide; not the *jury*. *Reynolds* v. *Lounsbury*, 534.

12. A declaration made by the plaintiff, with the intention of influencing the conduct of the defendant, who acts upon it, and will be injured if the plaintiff is allowed to gainsay it, is conclusive. Per Bronson, J. *Ib.*

13. Otherwise, of a declaration made by the plaintiff to a third person, without any intention of influencing the conduct of the defendant, though he afterwards hear of and act upon it. *Ib.*

FOREIGN LAW.

Laws are of no force, *ex proprio vigore*, beyond the territory of the sovereignty which enacted them, and the respect which is paid to them elsewhere depends upon comity. Per Nelson, Ch. J. *The Commonwealth of Kentucky* v. *Bassford and Nones*, 526.

2. Every sovereignty has the right of determining for itself how far this comity shall be extended. Per Nelson, Ch. J. *Ib.*

FORGERY.

After notice of executing a writ of inquiry was served upon an attorney, he altered the figures indicating the day appointed for executing the writ, in order to make the notice apparently irregular, and with intent to defraud: *Held*, not a *forgery* either under the statute or at common law. *The People* v. *S. V. Cady*, 490.

FRAUD.

Where, on a composition between a debtor and creditor, they induced a third person to become surety for the payment of one half the debt, by representing to him that this was to be in full of all demands, and the debtor, in pursuance of a previous arrangement of which the surety was unapprized, gave his own note for an additional sum; *held*, that the note having been given in fraud of the surety, the creditor could not enforce it. *Weed and Weed* v. *Bentley*, 56.

FRAUDULENT SALE OR ASSIGNMENT.

Where the validity of a sale of chattels depends upon whether it was made with *intent* to defraud creditors, however clear and conclusive the evidence of fraudulent intent may be, the judge is bound to submit the case to the jury. Per Bronson, J. *Vance, by his next friend* v. *Phillips, late sheriff, &c.*, 433.

2. But if the jury find against the evidence, the court will set aside the verdict and grant a new trial. *Ib.*

3. The cases of *Butler* v. *Van Wyck*, (1 Hill, 438,) and *Hanford* v. *Artcher*, (4 Ib. 271,) commented on. *Ib.*

4. A merchant, being in insolvent circumstances, sold his whole stock of goods to an infant, who was his clerk and brother-in-law, taking the infant's notes for the price; and the merchant immediately absconded. *Held*, that the transaction was fraudulent and void as to creditors, and a verdict affirming its validity was set aside as contrary to evidence. *Ib.*

5. A debtor in failing circumstances assigned nearly all his property in trust, to sell the same and apply the proceeds towards paying four of his creditors, making no provision for the rest; and the assignment directed that *the surplus, if any, after paying the four creditors, should be returned to the assignor, his heirs, &c.* Held, that the assignment was fraudulent and void on its face, the provision as to the surplus being a trust for the use of the assignor. *Goodrich* v. *Downs*, 438.

6. The assignment cannot be aided in such case by extrinsic evidence that the assigned property would not sell for enough to pay the creditors provided for. *Ib.*

7. If any *part* of an assignment be contrary to the statute for the protection of creditors against fraudulent transfers, the *whole* is void. *Ib.*

8. The question whether an assignment is void on the ground of its having been made with *intent* to defraud creditors, is for the jury. *Ib.*

9. But where the assignment shows on its face that it was made *in trust for the use of the assignor*, either in whole or in part, the court is bound to pronounce the transaction void, without submitting the question to the jury. *Ib.*

GUARANTY.

The terms of a guaranty must be strictly complied with, or the guarantor will not be bound. Per Bronson, J. *Walrath* v. *Thompson*, 540.

2. J., being desirous of purchasing goods of the plaintiff on credit, procured a letter of guaranty from the defendant to the plaintiff, containing the following clause: "Mr. J. thought it would be an accommodation to him to have you wait [for payment] until the *1st of January*, 1840; if that will answer your purpose, I will be surety for the amount to be paid at that time." The plaintiff sold the goods to J. on the receipt of the letter, but took his note for the price payable on the *25th of December*, 1839. J. was not called on to pay the note, however, and after the 1st of January,

1840, the plaintiff brought an action to enforce the guaranty. *Held*, that inasmuch as he had not *agreed* to wait for payment until the day proposed by the guaranty, the defendant was not liable. *Ib.*

3. A letter of guaranty, addressed by the defendant to a mercantile firm, was as follows: "If you will let A. have one hundred dollars' worth of goods on a credit of three months, you may regard me as guarantying the same." *Held*, that notice of acceptance was not necessary to render the defendant liable, but that he became absolutely bound the moment the goods were delivered in compliance with the guaranty. *Smith & Crittenden* v. *Dann*, 543.

4. *Held* further, that though the firm, on delivering the goods to A., took his note payable in "three months," without excluding *days of grace*, this was not a variance from the credit proposed by the guaranty. *Ib.*

5. A guaranty, like other commercial contracts, must be construed with reference to the known usage of trade. *Ib.*

6. If a guaranty propose a certain credit, that particular credit must be given, or the surety will not be bound; and a variance of three days will be fatal. *Ib.*

LARCENY.

Ice, when put away in an ice-house for domestic use, becomes individual property, so as to be the subject of larceny. *Ward* v. *The People*, 144.

2. Under an indictment for larceny, alleging the goods to be the property of F., and to have been stolen from him, the prisoner may be convicted, though it should turn out that F.'s possession was acquired by theft; and hence the inquiry whether F. had thus acquired possession is irrelevant. *Ib.*

3. There are no accessories in petit larceny; but all concerned in the commission of the offence are principals. *Ib.*

LIEN.

If a common carrier be induced to deliver goods to the consignee, by a false and fraudulent promise of the latter that he will pay the freight as soon as they are received, the delivery will not amount to a waiver of the carrier's lien, but he may disaffirm and sue the consignee in replevin. *Bigelow* v. *Heaton*, 43.

2. Though, after a lien had been acquired upon a vessel pursuant to 2 *R. S.* 493, she made a short excursion beyond the bounds of the state, for the mere purpose of testing her machinery, and immediately returned; *held*, that the creditor had not thereby lost his lien. *Hancox and others* v. *Dunning & Browning*, 494.

3. Otherwise had the vessel left the state on a trip or voyage in pursuit of some kind of trade or business. Per Bronson, J. *Ib.*

LIMITATIONS, STATUTE OF.

The statute of limitations is a defence not favored, and the party intending to rely upon it must plead it in the first instance. He will not be allowed to amend by adding such plea. *Wolcott* v. *McFarlan*, 227. *Lovett* v. *Cowman, impleaded, &c.* 223.

NEW TRIAL.

Where it clearly appears that a witness has fallen into a mistake in giving his testimony upon a material point in the cause, the court may in its discretion grant a new trial. *Coddington* v. *Hunt, impleaded with Randolph*, 595.

2. But unless the court are satisfied that the mistake had the effect of turning the verdict, they will not interpose. *Ib.*

OFFICE AND OFFICER.

An officer has no right to break the outer door of a man's dwelling-house for the purpose of serving civil process *in the first instance*, whether the process be against his person or property. Per Bronson, J. *Glover* v. *Whittenhall*, 597.

2. But where the execution of the process *has been properly commenced*, the officer may afterwards break the outer door, if necessary, for the purpose of continuing and completing the performance of his duty. *Ib.*

3. After a levy upon goods in a dwelling-house by virtue of a *fi. fa.* against the owner, the officer went away before completing his inventory. He returned the next day in order to resume his control over the goods, but was refused admittance; whereupon he forced an entrance through one of the

outer doors. *Held*, that the entry was lawful. *Ib.*

4. *Held* further, that though the defendant in the *fi. fa.* intermediate the levy and the forcible entry, served the officer with a judge's order staying *all proceedings* upon the writ, preparatory to a motion for setting it aside, this only operated to suspend the power of sale, but did not affect the officer's right to enter for the purpose mentioned. *Ib.*

5. Had no prior levy been made, the service of the order would have prevented the making of one. *Semble.* *Ib.*

6. Such orders must be construed with reference to the object for which they are granted. Per Bronson, J. *Ib.*

PAYMENT.

A payment in counterfeit bank bills is a nullity, and will not discharge the debt, though both parties suppose them to be genuine. *Thomas* v. *Todd*, 340.

2. So of payment in the genuine bills of a bank which has failed, neither party being aware of the fact. Per Bronson, J. *Ib.*

3. But in these cases the party receiving the bills must return them within a reasonable time after discovering their worthlessness, or he will be obliged to sustain the loss. *Ib.*

4. Where a bank bill was delivered in payment on the 5th of May, both parties supposing it to be genuine, and the creditor learned that it was counterfeit about the same time, but made no offer to return it until the 4th of July following; *held*, that he had lost his remedy. *Ib.*

PRINCIPAL AND AGENT.

An agent authorized to sell an article is presumed to possess the power of warranting its quality and condition, unless the contrary appear; and this, whether the agency be general or special. *Nelson* v. *Cowing & Seymour*, 336.

2. *Semble*, that the principal will in such case be affected by the *fraudulent representations* of the agent in making the sale. Per Bronson, J. *Ib.*

PROPERTY.

If one wrongfully take another's grain and manufacture it into whisky, the property is thereby changed, and the whisky belongs to the manufacturer. *Silsbury & Calkins* v. *McCoon & Sherman*, 425.

2. Where the wheat of A. was mixed with that of B., by being put into a common bin with the consent of both parties, and B. afterwards sold the whole; *held*, that the intermixture created a tenancy in common between them, and that the sale by B. rendered him liable to A. *in trover*. *Nowlen* v. *Colt*, 461.

SLANDER.

In an action for slander, the plaintiff may show that the words laid in the declaration were repeated on various occasions, although the declaration contains but one count. *Root* v. *Lowndes*, 518.

2. Actionable words different from those laid in the declaration, however, cannot be given in evidence, unless the statute of limitations has run in respect to them. *Ib.*

3. Whether such words can be given in evidence even where the statute of limitations has run, *quere*. *Ib.*

USURY.

The defence of usury is one not favored, and a defendant seeking to avail himself of it must take care to set it up at the proper time and in the proper manner; especially if his object be to call the plaintiff as a witness, under the act of May 15th, 1837. Per Bronson, J. *Lovett* v. *Cowman, impleaded, &c.*, 223.

2. Accordingly, where the defendant, intending to avail himself of the testimony of the plaintiff, gave notice of the defence of usury, but the affidavit verifying the notice turned out to be insufficient, the court refused an application for leave to amend by annexing a new affidavit to the notice. *Ib.*

Intelligence and Miscellany.

Leading Questions. — Sir Walter Scott was a well-read and sound lawyer, perfectly familiar with the Scotch practice. No one can read his life without being satisfied that much of his knowledge of human nature and the secret springs of action, as well as his power of delineating human sufferings, was materially strengthened by his constant experience in the duties of his office as a clerk of sessions. There are in his novels some of the most graphic descriptions of legal proceedings to be found in any books, and every lawyer must have noticed the occasional turns given to the course of events in order to illustrate the value, or show the absurdity of some legal principle. Witness the trial of Effie Deans for child-murder, in which he has thus briefly alluded to the use of *introductory questions* to a witness, and observed upon objections to *leading questions*.

"After the advocate had conceived that by these preliminary and unimportant questions he had familiarized the witness with the situation in which she stood, he asked 'whether she had not remarked her sister's state of health to be altered during the latter part of the term when she had lived with Mrs. Saddletree?' Jeannie answered in the affirmative.

"'And she told you the cause of it, my dear, I suppose?' said Fairbrother, in an easy, and, as one may say, an inductive sort of tone.

"'I am sorry to interrupt my brother,' said the crown counsel, rising, 'but I ask, in your lordship's judgment, whether this be not a leading question?'

"'If this point is to be debated,' said the presiding judge, 'the witness must be removed.' For the Scottish lawyers regard with a sacred and scrupulous honor every question so shaped by the counsel examining, as to convey to a witness the least intimation of the nature of the answer which is desired from him. *These scruples, though founded on an excellent principle, are sometimes carried to an absurd pitch of nicety*, especially as it is generally easy for a lawyer who has his wits about him to elude the objection. Fairbrother did so in the present case.

"'It is not necessary to waste the time of the court, my lord, since the king's counsel think it worth while to object to the form of my question, I will shape it otherwise.

"'Pray, young woman, did you ask your sister any question when you observed her looking unwell? — take courage — speak out.'

"'I asked her,' replied Jeannie, 'what ailed her?'

"'Very well — take your own time — and what was the answer she made?' continued Mr. Fairbrother.

"Jeannie was silent, and looked deadly pale. It was not that she at any one instant entertained an idea of the possibility of prevarication — it was the natural hesitation to extinguish the last spark of hope that remained for her sister.

"'Take courage, young woman,' said Fairbrother. 'I asked what your sister said ailed her when you inquired?'

"'Nothing,' said Jeannie, with a faint voice, which was yet heard distinctly in the most distant corner of the court room, such an awful and profound silence had been preserved during the anxious interval which had interposed betwixt the lawyer's question and the answer of the witness.

"Fairbrother's countenance fell, but with that ready presence of mind which

is as useful in civil as in military emergencies, he immediately rallied.

"'Nothing! True; you mean nothing *at first* — but when you asked her again, did she not tell you what ailed her?'

"The question was put in a tone meant to make her comprehend the importance of her answer, had she not already been aware of it. The ice was broken, however, and with less pause than at first she now replied.

"'Alack! alack! she never breathed word to me about it.'

"A deep groan passed through the court," &c. &c.

A Letter from New York.

To the Editor of the Law Reporter.— In the May number of your journal, something was said about the *courts* of the city of New York. It was little more than an enumeration; but even the enumeration was incomplete, as the *surrogate's* court was not mentioned. The office of surrogate corresponds to that of judge of probate in New England, and being one of the most important and responsible offices in the city, is generally filled by an able and distinguished lawyer. The surrogate of this city holds court constantly, Sundays excepted, and finds business enough to keep himself and half a dozen clerks sufficiently employed.

Lawyers. — To ascertain the exact number of lawyers in this city is quite impracticable. The lists that are published from year to year are inaccurate and incomplete. The last one published makes the number between eleven and twelve hundred. In round numbers we say twelve hundred, which is undoubtedly a low estimate; but where there are so many, a few scores more or less are quite immaterial. Among such a multitude, and in such a city, as it is easy to suppose, are to be found men of almost all sorts, of every variety of character and talent, and possessing almost every possible degree of legal attainment. Although we have no one possessing the transcendent ability of Daniel Webster, we have many who, in learning and forensic talent, would not suffer by comparison with the bar of any other place or country. And we have those who are distinguished only by their ignorance and imbecility. Between these extremes are those of every other conceivable grade. All live, and live by the practice of the law, although the *kinds* and *modes* of practice are as various as are the characters and talents of the practitioners. All live by the law, if not always *according* to the law, and some, though not a large number, grow rich. The character of the profession, in any particular place, will always be found to correspond with the characters and habits of the *people* of that place — not because the characters of lawyers are always formed by the influences around them, and accommodated to people among whom they live, though such is too often the case — but simply because "birds of a feather flock together," — or, according to the law of "demand and supply," as political economists have it. Here, amidst the most heterogeneous population that can be found on the face of the earth, carrying on every imaginable kind of lawful and unlawful business, with an energy and recklessness that is astounding to all sober and prudent men, it is not at all strange that there are fools enough to keep folly in countenance, and knaves enough to fill the pockets of unscrupulous lawyers with dollars. Notwithstanding all this, there is probity and intelligence enough in this people, to make it for the interest of every lawyer who deserves the name, to be what every *true* lawyer ought to be and generally is, equal in probity of character, and superior in learning and sagacity, to any other class of men. And such, it is gratifying to know, is in appearance and in fact, the general character of the members of the bar in the city of New York.

Yours truly,

— —

New York, July, 1845.

Connecticut Legislation. — Our last number contained a notice of Governor Baldwin's message, in relation to the Washington Bridge Company, in which we expressed surprise at the action of the Connecticut legislature, in passing a resolution which seemed to affect the privileges of a corporation, in a manner not justified by the facts in the case, and a just regard to the rights of the citizen. We have since received the report of the committee, with a re-

quest, that, as an act of justice, a synopsis of it might be given in the present number of the Law Reporter. With this request we cheerfully comply, but we have unfortunately mislaid the message of Governor Baldwin, and cannot therefore present both sides of this important question, with the fulness that is desirable.

The main point not presented in our statement of the facts in the case, appears to be an averment in the report, "that it is manifest, from the whole scope and tenor of this act of incorporation, that it was not the intention of the general assembly to prevent any vessel duly registered or licensed, from going to, or returning from, her port of delivery. Hence the act provides, that '*all* vessels shall be permitted at *all* times, to pass said draw, without the payment of toll,' and although the width of the draw is prescribed to be thirty-two feet, which was supposed to be sufficient for the navigation then carried on, yet the intent of the legislature, and the understanding at the time, of all parties, evidently were, as the act itself declares, that '*all* vessels shall be permitted at *all* times' to pass." The bridge was destroyed in 1807, and the company applied for a modification of their charter, which was granted, with a proviso, that nothing therein contained should be so construed, as to impair the rights, privileges, and immunities, of persons, using and navigating the river. The committee maintain that the general assembly is the appropriate tribunal to grant relief in the premises, and refer to the case of *Burnel* v. *New Haven & East Haven Toll Bridge Company*, (4 Connecticut Reports,) and to several acts of the legislature of Connecticut.

Court of Common Pleas.—The full court of common pleas met in Boston last month, and assigned the circuits for the year. We copy the list below for the benefit of our readers in Massachusetts. The new court has now got well under way, and it is due to the judges to state that they have been indefatigable in their efforts to do the business before them. In this they have had good success, and in some parts of the state the dockets were never in better condition. This is the more creditable, as in some instances there was an accumulation of business which it required great industry to dispose of.

Suffolk.

Municipal. August, September, October, Cushing; November, Washburn; December, Colby; January, Ward; February, Wells; March, Cushing; April, Colby; May, Ward; June and July, Cushing.

C. C. P. October, Merrick; January, Washburn; April, Wells; July, Colby.

Essex.

September, (*Newburyport*) Washburn; December, (*Ipswich*) Ward; March, (*Salem*) Ward; June, (*Ipswich*) Merrick.

Middlesex.

September, (*Lowell*) Wells; October, (*Lowell*) Ward; December, (*Cambridge*) Cushing; February, (*Cambridge*) Cushing; March, (*Concord*) Washburn; June, civil, (*Concord*) Colby; June, criminal, (*Concord*) Cushing.

Worcester.

September, civil and criminal, Merrick; December, Merrick; January, Merrick; March, Merrick; May, Washburn; June, Washburn.

Hampshire.

August, Ward, November, Colby; March, Colby.

Franklin.

August, Washburn; November, Colby; March, Colby.

Hampden.

October, Colby; December, Ward; February, Colby; May, Cushing; June, Wells.

Berkshire.

October, Wells; February, Colby; June, Washburn.

Norfolk.

September, Colby; December, Wells; April, Ward.

Bristol.

September, (*Taunton*) Ward; December, (*New Bedford*) Washburn;

March, (*Taunton*) WELLS; June, (*New Bedford*) COLBY.

PLYMOUTH.

August, WARD; December, CUSHING; April, COLBY.

BARNSTABLE.

September, WARD; April, COLBY.

NANTUCKET.

October, WASHBURN; June, WARD.

DUKES.

September, WASHBURN; May, WARD.

Hotch-Pot.

It seemeth that this word *hotch*-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

We intimated, sometime ago, on the authority of a letter from London, that Lord Brougham was a writer for the London Law Magazine, but we expressed a doubt of the statement. From some remarks in the May number, at the end of a review of Lord Eldon's life, there appears to be no room whatever for any doubt upon the subject. Lord Brougham is there cut up in a style of ironical invective, that would do honor to his own pen, steeped as it often is in gall and bitterness. In speaking of a review of the life of Lord Eldon, in the Law Review, the writer in the Law Magazine says it is attributed to Lord Brougham, but that "such a supposition is not only inconsistent with that strict and fastidious regard to truth which, as is well known, Lord Brougham carries to a pitch amounting even to puritanical rigor, but with that ordinary degree of veracity which in this working-day world of ours is requisite to keep a man's character on a level with that of his neighbors." The writer then alludes to the well known detestation of William IV. towards Lord Brougham, and to the connection of his lordship with the whig administration. "That there were many people," he says, "unjust enough to suspect Lord Brougham's political purity, even at that time, is unfortunately true, and, strange as it may appear, in spite of his lordship's subsequent conduct, in spite of his disinterested support of those who have of course abandoned their old opinions for the sake of embracing his, nay, more, in spite of his lordship's repeated declarations to the contrary, in season and out of season." Now, when it is considered that Lord Brougham undoubtedly *did* write the article in the Law Review, and when it is recollected that this distinguished lawyer and politician is in nothing more distinguished than for his random assertions, for a disregard of truth in ordinary conversation, and for political inconsistency, it must be considered as very singular if he writes for a magazine which indulges in such comments on his character.

At the late term of the supreme judicial court in Barnstable, a case of a novel character in Massachusetts was tried before Dewey, J. It was an action of the heir to recover land of the husband of a deceased sister who claimed to hold as tenant by the curtesy. The question for the jury was, whether the defendant's wife gave birth to a living child. The females present at the birth testified to the facts supposed to have a bearing upon the question; and two physicians were called by the defendant, and asked whether, in their opinion, upon the facts testified by the women, the child was born alive. They answered in the affirmative. But what seems strange, the physician who was in attendance at the birth, though present in court, was not called by either party. The jury returned a verdict in favor of the living child. The case was managed by Marston and Elliott for the plaintiff, and by Clifford and Scudder for the defendant. We do not understand upon what principle a Plymouth jury should return a verdict against Judge Marston.

In the "Choice of Change," printed at London, 1385, we find the following:

"Whosoever will retaine a lawier, and lawfully seeke his own right, must be furnished with three pockets. In the first pocket he must have his declarations and certificates, wherewith he may show his right. In the second pocket he must have his red ruddocks ready, which he must give into his lawier, who will not set penne to paper without them. In the third pocket he must have patience, which must stand him in stead when his Lawiers do delay him and when sentence passeth against him."

General Fessenden, of Maine, once doubted whether a little boy, who was offered as a witness, understood the nature and obligations of an oath, and proposed to examine him on that point — "My boy, can you repeat the Lord's prayer?" "Yes, sir," was the immediate reply, "*Can you?*" The boy was admitted without further objection.

We have received the catalogue of standard Law Books published by Messrs. Gould, Banks & Co. of New York, and William A. Gould & Co. of Albany. It contains a large number of valuable law publications, and will be furnished, we presume, to any member of the profession, on application.

"I don't know about that, I don't know about that," exclaimed a New York judge, interrupting a counsellor, whose pungency is equal to his learning and ability. "I see your honor don't know, but I do," was the reply.

As a flock of sheep were racing through Court street (Boston,) some one said that the poor creatures instinctively ran fast through the place where so much fleecing was done.

We understand that the publication of the New York Legal Observer, after a suspension of some months, has been resumed.

Obituary Notice.

DIED at his seat, Leesons, in Kent, on Monday the 3d of March, William Draper Best, first Baron Wynford, and Lord Chief Justice of the Common Pleas, in the seventy-eighth year of his age.

The deceased nobleman was born at Husselbury Plucknett, in Somersetshire, on the 13th of December, 1767, and received his early education at the grammar school of Crewkerne, in the same county. Confirmation of the rule, deduced from observation and doubtless founded in truth, which assigns to the mother the transmission of the genius, and to the father that of the constitution, is exhibited in the instance of Lord Wynford. On the female side he was descended from an ancestor who was common also to the illustrious Earl Chatham. His father was Thomas Best, Esq., of whom we have no material account, save that he died when the subject of this memoir was but three years old. His mother, a lady of penetrating intellect and superior powers, was the daughter of Sir William Draper; a gentleman who, it will be remembered, was the first that had the boldness to break a lance with Junius; and who, if in the defence of his friend Lord Granby, he was worsted by his powerful opponent, it was owing less perhaps to inferiority of ability on his part, than to the weakness of the facts which his cause afforded as arms for the encounter, while in classical feeling and elegance, if not in refined and polished irony, it is admitted that both champions were equal.

From Crewkerne school Mr. Best was removed, at the age of fifteen, to Wadham College, Oxford; it being his intention at that time to stand for a fellowship and enter the church. One of those accidents, unforeseen and suggesting the idea of Providence, which in early days prove the hinge whereon turns the destiny of life, prevented this. He had been at the university just two years, when, by the death of a first cousin, he found himself in the possession of a large moiety of a considerable estate, the entirety of which had some time been the property of his own branch of the family. Upon this he abandoned the intention of entering holy orders, quitted Oxford in his seventeenth year, and determined on adopting the law for his future profession. Accordingly he entered the Middle Temple, was duly called to the bar in Michaelmas term, 1789, and selected the home circuit as the field for his provincial labors.

Between this date and that when, in compliance with the advice of his friends, he assumed the dignity of the coif, there elapsed a period of eleven years. Early, during his probation as junior, he gave evidence of a clear, penetrating, and comprehensive mind. If accident determined him to the profession of the law, to accident also was he indebted for the first important opportunity of distinguishing himself. It was the case of Peppin *v.* Shakspear, where the question for argument was "the rights of a lord of a manor in respect to the appropriation of the wastes," which brought him into favorable notice. In the absence of the learned counsel who led in this cause, the brief fell into the hands of Mr. Best, and so complete was the familiarity he showed with the details of his case and the law affecting the question, such the acumen and self-possession he displayed in this emergency, that Lord Chief Justice Kenyon, who presided, deemed proper, in delivering the judgment of the court, to address to the young advocate a very flattering and encouraging eulogium. The habitual guardedness of the judge, his distinguished eminence as a lawyer, and the discrimination he always evinced in his award of praise, added force and value to the compliment. From this time the fame of Mr. Best may be said to date, and he found successive opportunities for extending it in the important cases of Sinclair, on the prosecution of De Colonne; Rex *v.* Innis (argued before the twelve judges); Rex *v.* Aslett; and Rex *v.* Despard. Indeed, both on circuit and in *the hall*, he early secured an extensive, lucrative, and first-rate practice.

In Hilary term, 1800—that is, in his thirty-third year—Mr. Best was invested with the coif, and the motto he then selected for his ring was "*Libertas in Legibus*," a maxim which, notwithstanding the insinuations to the contrary, thrown out by a contemporary, he justified by his conduct, both in and out of parliament, to the very close of his career. His professional duties were, however, by no means restricted to the Common Pleas; but so eminent at this time was his reputation, and such the confidence inspired by his judgment and ability, that there were not many cases of importance in the King's Bench or Exchequer in which he was not retained.

The qualities of Mr. Serjeant Best as an advocate (already slightly touched upon) were varied and extensive; such indeed as are not often combined in the same individual. They would seem, however, to have been more useful and ready than either lofty or brilliant. It cannot be said of him that he was at any period of life a great orator. He wanted the passion and coloring, the vehement earnestness and self-sinking, essential to such a character, and by means of which the stronger prejudices of the human heart may be surely put in motion and the aim of the advocate obtained. His general attainments were extensive, but superficial; they were precisely such as are acquired by men of strong natural parts and keen observation, who mingle freely with the world, but are too indolent to apply themselves intently to the investigation of its phenomena. Yet, despite of this, such were his tact and caution, that it was rarely indeed he committed himself or betrayed the shallowness of his learning. His forensic merits chiefly lay in the sagacity, foresight, and prudence with which he conducted a cause; in the rapidity with which he seized upon such points as turned up favorable to his purpose; the facility he ever displayed in extricating himself from unforeseen difficulty; and in the judgment and energy with which he addressed a jury. Furthermore he was remarkable for clearness and cogency of argument, and the success which attended him before the judges *in banc*. His style of speaking was forcible and pointed, rarely declamatory, and never florid; his diction was choice; but, great as was his practice, he never attained to unfaltering fluency of speech; more than once, indeed, he has made a dead stand. In gesture he was graceful and impressive, and his countenance —no inconsiderable adjutant—was flexible, animated, and expressive.

Mr. Serjeant Best having now achieved a widely spread and honorable reputation, and being furthermore in the enjoyment of that which at the bar is its unfailing and welcome concomitant—a bountiful income, next directed his ambition, as do most successful lawyers, to the senate. He accordingly stood and was returned for Petersfield at the general election in 1802. In the following year he made himself prominent in the house, by the active part he took in the debate on the question of peace or war with France, and the determined stand he made against the cession of Malta to that country. His language on that occasion was that of a true Englishman, and is worthy of being preserved; he declared "that if the smallest spot on earth were demanded of us in the manner and under the circumstances that France demanded Malta, he would refuse it, because he would consider it as essentially connected with the safety and interest of the British empire." This declaration at such a time proves the courage equally with the patriotism of the man; it will remind the reader of the determined language recently used by the two great leaders of the rival parties on another important national question, and will be admired equally with the firm and united position they assumed on that occasion. In 1803, Serj. Best opposed the reading of Magistrates Protection Bill, and other measures canvassed about the close of the Addington administration. In June of the subsequent year his name stands in the minority on the Additional Defence Bill, brought in by Mr. Pitt; and he voted with 106 against 313 on the occasion of Mr. Grey's amendment to the address to the throne on the Spanish war. In 1804, also, we find him among the 217 members who pronounced on the culpability of Viscount Melville. Amongst other proofs of his activity and vigilance in the house is the inquiry he originated into the unconstitutional proceedings of the government in raising money by exchequer bills without the sanction or authority of parliament. But the most important, and looking at the then condition of church endowment in London, perhaps the most beneficial of his parliamentary labors was the introduction of a bill, which he carried through the house, for improving the livings of the metropolis. In proof of their gratitude for his exertions, the clergy of London subscribed for a costly piece of plate, which they presented to him in form, with becoming compliments.

In March, 1809, Mr. Serjeant Best, who, in addition to his parliamentary duties, found time for the onerous labors of a first-rate practice, was elected, in the room of Lord Grantley, recorder of Guildford. Five years after this he was returned member for Bridport. From the details of his votes already given, it will have been remarked that during the early part of his parliamentary career he was a partisan of the whigs. From this time, however, the deceased lord transferred his support to the tories, to whom, indeed, he steadfastly continued it to the close of his life. Another bill, especially worthy of note in this place, he carried through the house, and that was a bill to amend the Insolvent Debtors' Act; a measure shaped in a right direction, since its intention was to mitigate the cruelty and stringency which at that time characterized our law of debtor and creditor. We do not remember that he carried any other undertakings of importance through the house of commons, nor are we furnished with any in the several memoirs of the deceased nobleman which we have consulted. The last time we find him prominently before the public was, after his elevation to the house of lords, when the Reform Bill was before parliament. He resolutely opposed the second reading, urging, as justification, his belief that the measure, as sent up by the Commons, was calculated to increase more than to diminish bribery; and that, though it might sweep away a number of close boroughs, the benefit would be but temporary, since the extension of local interests will always create more. On the presentment of the last amended bill from the commons, however, he urged the opposition to consent to the passing of schedule A, stipulating at the same time for an enlargement of the towns in schedule B, so that none should have less

than 1000 constituents, and in case a majority of these be tenants of one man, they were to be augmented proportionably beyond that number. He proposed, also, that the qualification for voting should be increased proportionably to the population of towns; a novel and we think a happy idea, since the relative value of houses differs in ratio to the extent of population. Though solicited, it is said, by high personages, to withdraw from the house, as many peers did on this important occasion, he refused compliance, but, continuing in his place, pushed every amendment which he might hope to carry.

In his character of statesman, Lord Wynford was less respectable than in those of advocate and judge. He has been charged, and truly charged, with unblushing tergiversation, and that too at a period when the party he had adopted, and the principles he had so long advocated, most needed his support. Indeed, as far as party is concerned, there is reason to doubt his sincerity with either. He seems to have been governed but by one rule of action in politics, to aid that side from which most might be expected. As a parliamentary speaker he was far less successful than as an advocate. The requirements of each character, indeed, differ so materially, that there is small occasion for disappointment at this.

At the recommendation, we are told, of the Prince Regent, who observing that the state of his health rendered him unequal to the laborious duties of a leading counsel, he was appointed one of the puisnè justices of the court of king's bench, on which occasion he received the honor of knighthood; and in 1824 he was made lord chief justice of the common pleas.

As a judge, Sir Thomas Best held a high rank: his first reported judgment occurs in the case of Kearney *v.* King, 2 B. & Ald. 301; it was an action of assumpsit against the defendant as acceptor of a bill of exchange for 542*l.* 1*s.* 8*d.*, stated in the declaration to have been drawn and accepted at Dublin, without alleging it to be at Dublin, in Ireland, which was the case; the sum also being Irish currency and less than the English value. This being proved at the trial, was held a fatal variance. Mr. Justice Best's terse and clear mode of stating the decision, gives one of the fairest as well as the earliest specimens of the character of his judgments. It is in these words:—

"The defendant in this case is entitled to a nonsuit, inasmuch as the plaintiff has given no evidence of the bill stated in the declaration; and the defendant is clearly warranted in saying, that he never promised to pay that bill. For from the evidence it appears, that he promised to pay, not that bill, but another, one-twelfth less in amount."

We cite this, not as a proof of deep knowledge or extensive research, but as illustrative of the plain, pointed and matter-of-fact mode in which he presented the gist of a principle, and exhibited at once the reason and the application of the law he pronounced. Volumes 2, 3, 4 & 5 of Bingham's Reports are full of judgments of the then Chief Justice Best, which amply entitle him to rank among eminent judges. Although some excelled him in depth of acquirement, and many surpassed him in the technicalities of pleading and as mere practical lawyers, we question whether he was equalled in the power of tersely and plainly applying the principle to the case, and interlacing the law and fact in the easy current of brief and lucid judgments. A fair illustration of this valuable faculty is to be found in the case of Seaton *v.* Benedict, 5 Bing. 28 (selected as one of Smith's leading cases,) which defines and limits the liability of a husband for his wife's debts:—

"A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries, he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he see her wear it without disapprobation. In the present case, the husband furnished his wife with all necessary apparel, and he was ignorant that she dealt with the plaintiff. No article was delivered in his presence, nor was there distinct proof that any had been worn. If, therefore, money had not been paid into court, the defendant was clearly entitled to a verdict. What then is the effect of that payment? If the money had been paid in on the first items of the bill, an authority to contract at the date of these items would have been acknowledged — an authority which could not afterwards have been retracted, but by express notice. But there is no evidence to show that the money was not paid in on the last items; and if so, there was no agency for the first. The payment into court, therefore, recognizes no agency beyond the amount of 10*l.* And, if so, there is no pretence for supporting this verdict. It may be hard on a fashionable milliner, that she is precluded from supplying a lady without previous inquiry into her authority. The court, however, cannot enter into these little delicacies, but must lay down a rule that shall protect the husband from the extravagance of his wife."

Hall *v.* Smith, 2 Bing. 156, 267; Leadley *v.* Evans, 2 Bing. 32; Davis *v.* The Bank of England, 2 Bing. 393; Wickes *v.* Clutterbuck, 2 Bing. 483; Fletcher *v.* Sondes, 3 Bing. 501; Duvergier *v.* Fellows, 5 Bing. 248; Horner *v.* Ashford, 8 Bing. 322; Price *v.* Wellyan, 4 Bing. 597, among many others, well indicate the features of the judicial decisions of Sir Thomas Best. The case of Smith *v.* Sparrow, 4 Bing. 84, exhibits the breadth of principle on which he loved to build his judgments. The *rami fluentes* which adorn some more modern judgments were carefully rejected by the higher powers of Judge Best's mind. From the *sesquipedalia verba* which infest our language, his style was remarkably free. In expressing plainly and briefly what he had first clearly thought out, we think that the effect and eminence of his judgments chiefly arose. This is a most praiseworthy power: we wish it were far more practised than it is, both on the bench and at the bar.

As a nisi prius judge, Sir William Best

was far from free from that bias of temper, and it has been said even of political prejudice, which can never exist in the conduct or character of a judge without grave injury to the dignity of his office and the lustre of his fame. Mr. Creesy once brought before parliament a charge of judicial intemperance against Sir William Best; he was moreover accused of being the advocate even on the bench, a fault which has been the bane of many a highly qualified mind; and by Lord Wynford's failing in this respect, and the lasting discredit it has entailed upon him, one of the junior judges of this day may derive a useful warning.

The circumstances which led to Lord Chief Justice Best's retirement from the common pleas, and his appointment to the office of deputy speaker to the house of lords, have thus been stated in the Globe, in a clearly written memoir, which is substantially correct:—

"When Sir Charles Wetherell vacated the attorney-generalship, ministers found themselves in some perplexity, shown by the unusual time which elapsed before the nomination of a successor to the post. After having once before suffered another to be put over his head as first law officer, Sir Nicholas Tindal (then solicitor-general) could not, without being a party to his own degradation, again submit to such an indignity. To have promoted him to the attorney-generalship would have involved the necessity of an appeal to his constituents; which, if disastrous, as it was likely it would be, and following upon Mr. (now Sir Robert) Peel's rejection at Oxford, it would have been not only disagreeable, but probably fatal to the government. A vacancy was therefore created for him on the bench. Sir N. Tindal would have preferred to have been made chief baron of the exchequer; and it was actually proposed to Chief Baron Alexander that he should retire upon a peerage; but the proposition was rejected. The chief baron had no claim to a pension, and had no disposition to resign the solid advantages of his post for the empty honors of a peerage. The next application was to Chief Justice Best, who had already thrown out hints of a desire for a coronet. The prospect of obtaining the object of his hopes had such an effect upon a constitution already impaired by hereditary gout, as to bring him at once within the meaning and intent of the acts of parliament regulating the retirement and pensions of the judges. His case was decided as being within the statutory provisions; and his lordship retired with a pension of 3750*l*. But although compelled to withdraw from the bench, no longer able to perform its duties, and under a statute which requires that the judge to whom the pension is granted shall be afflicted with 'a permanent bodily infirmity disabling him from the due execution of his office,' Lord Wynford was nominated to the office of deputy speaker of the house of lords—in direct violation of the terms, as well as the spirit, of the wholesome statute. On the formation of the Grey administration, 1830, this disgraceful job was set aside. The disappointment inflicted on Lord Wynford was never forgiven."

It now only remains to close this brief sketch, which is taken from the Law Magazine, with some remarks on the private and personal character of Lord Wynford. He had a handsome countenance, graceful and courtly manners, with much of that easy, unassuming confidence which distinguishes the gentleman. As already has been hinted, his education was loose and superficial, more the product of chance learning than of steady and judicious application. We believe, indeed, that he never completed his academical curriculum. His devotion to the sex amounted to a controlling passion; and there survives him, as the bad is wont to do, the memory of an act which well nigh brought to the felon's dock, on a capital charge, the advocate who, subsequently, in his capacity of judge, must have sentenced others to death, who had been guilty of a similar enormity. It is some palliation of this offence, that it was committed in the heyday of youth, when the passions are but too apt to overbalance principle; yet his lordship's love of gallantry, as Hazlitt has insidiously remarked, "even when tormented by gout and not young," did not forsake him. As far as ever the character is compatible with that of a leading advocate, he was a man of pleasure. It was remarked of Scott, that notwithstanding the thoughtful and voluminous works he produced, he had always so much leisure at command, as to seem an idle man—which, reduced to fact, means he judiciously subdivided and economized his time. A similar remark would apply to Lord Wynford. To have discharged the onerous and multifarious duties of an advocate as ably and successfully as he did, while devoting so much time to the gaieties and amusements of town, he must have been rapid in the discharge of business, and jealous of every moment whilst engaged in it. He was a man of strong prejudices, of hasty temper, yet endowed with a kind and cordial heart. It follows, therefore, that his friendships were as sincere as his dislikes were powerful. His conversational talents were showy and sparkling, his deportment more dignified than affable.